TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 114.

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND,
PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED MARCH 27, 1914.

(24,130)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 9, 1915.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Pennsylvania before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Commonwealth of Pennsylvania as plaintiff and the Fidelity and Deposit Company of Maryland as Defendant at No. 29 May Term 1913 in your said Supreme Court wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity
2 was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Fidelity and Deposit Company of Maryland as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of March, in the year of our Lord one thousand nine hundred and fourteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States, October Term, 191–. Fidelity and Deposit Company of Maryland vs. Commonwealth of Pennsylvania. Writ of Error. Filed in Supreme Court, Middle District, Mar. 10, 1914.

3 UNITED STATES OF AMERICA, ss:

To Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Pennsylvania wherein Fidelity and Deposit Company of Maryland is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, this sixth day of March, in the year of our Lord one thousand nine hundred and fourteen.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

March 12, 1914.

Service of the within citation accepted.

WM. M. HARGEST,
2nd Deputy Att'y Gen'l,
Att'y for Commonwealth of Penna.

[Endorsed:] Supreme Court of the United States, October Term, 1914. Commonwealth of Pennsylvania vs. Fidelity & Deposit Company of Maryland. Citation. Filed in Supreme Court, Middle District, Mar. 12, 1914.

4 The Answers of the justices of the supreme court of the State of Pennsylvania to the writ of error from the Supreme Court of the United States, hereunto annexed, as follows, to-wit:

Docket Entries of the Court of Common Pleas of Dauphin County.

Among the Records and Proceedings enrolled in the Court of Common Pleas in and for the County of Dauphin, in the Commonwealth of Pennsylvania, to No. 76, 1910, is contained the following:

Copy of Commonwealth Docket Entry.

COMMONWEALTH OF PENNSYLVANIA
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

Summons in action of Assumpsit to the Sheriff of Philadelphia. Returnable June 27, 1910. May 16, 1910. Plaintiff's statement and

copy of account filed. May 17, 1910, served writ and statement personally on Herman Hoopes, Vice President of Defendant Co. so answers Joseph Gilfellan, Sheriff. June 29, 1910. I appear for Fidelity and Deposit Co. of Maryland. Defendant.—Frederick M. Ott. June 24, 1910. Affidavit of defense filed. Nov. 17, 1910. Stipulation to try without Jury filed. March 13, 1913. Testimony filed. March 13, 1910. Judgment directed to be entered against the defendant, and in favor of the Commonwealth for the sum of ($429.67) unless exceptions be filed within the time limited by law. April 4, 1913. Defendant's exceptions filed, same day Court overruled exceptions to which Def't objects, and at its request a bill is sealed. April 22, 1913. Certiorari Sur Appeal No. 29, May Term, 1913, from the Supreme Court received and filed. April 26, 1913. Approved bond on Appeal filed. May 20, 1913. Certified.

LOCKWOOD B. WORDEN, *Prothonotary.*

5 *Præcipe for Summons in Assumpsit.*

In the Court of Common Pleas of Dauphin County.

No. 76, Commonwealth Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
FIDELITY AND DEPOSIT CO. OF MARYLAND.

SIR: Issue Summons in an Action of Assumpsit, on a settlement made by the Auditor General and State Treasurer, and direct the same to the Sheriff of Philadelphia County, in pursuance of the laws of this Commonwealth.

Returnable sec. leg.

J. E. B. CUNNINGHAM,
Deputy Attorney General.

To James H. Worden, Esq., Prothonotary.

May 14, 1910.

6 Endorsement: No. 76, Commonwealth Docket, 1910. Commonwealth of Pennsylvania vs. Fidelity and Deposit Co. of Maryland. Præcipe for Summons in Assumpsit. Filed May 14, 1910. M. Hampton Todd, Attorney General.

7 *Summons in Assumpsit.*

DAUPHIN COUNTY, *ss:*

[Seal of the Court of Common Pleas of Dauphin Co.]

Commonwealth of Pennsylvania to the Sheriff of Philadelphia County, Greeting:

We Command You that you summon Fidelity and Deposit Co. of Maryland, so that it be and appear before our Court of Common Pleas,

to be holden at Harrisburg, in and for said County on the Fourth Monday of June next, there to answer the Commonwealth of Pennsylvania Plaintiff, of a plea in an action of assumpsit. This writ is issued and directed to the Sheriff of Philadelphia County, in pursuance of the Acts of the General Assembly of Pennsylvania.

And have you then and there this writ.

Witness, the Hon. George Kunkel, President of our said Court, the 14th day of May, in the year of our Lord, one thousand nine hundred and ten.

JAMES H. WORDEN, *Prothonotary.*

8 Endorsement: No. 76 Commonwealth Docket, 1910. Commonwealth of Pennsylvania vs. Fidelity and Deposit Co. of Maryland. Summons in an action of assumpsit, To Philadelphia County. M. Hampton Todd, Attorney General. Served—Fidelity and Deposit Company of Maryland, the within named defendant Company, by handing personally May 17th 1910, a true and attested copy of the within writ, together with a copy of Plaintiff's Statement of Claim, to Herman Hoopes, the Vice President of said defendant Company, at Room #506 Real Estate Trust Building, in the County of Philadelphia, State of Pennsylvania. So answers William Leedom, Deputy Sheriff. Joseph Gilfillan, Sheriff.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

William Leedom, Deputy Sheriff, being duly sworn according to law, deposes and says that he served upon Fidelity and Deposit Company of Maryland, the within named defendant Company, a true and attested copy of the within writ together with a copy of Plaintiff's Statement of Claim, at the time, place and in the manner set forth in the above return.

WILLIAM LEEDOM.

Sworn and subscribed to before me this 18th day of May A. D. 1910.

[NOTARIAL SEAL.] JOHN V. RITTER,
Notary Public.

Com. expires March 7th, 1911.

9 *Plaintiff's Statement and Copy of Account.*

In the Court of Common Pleas of Dauphin County.

Commonwealth Docket, 1910, No. 76.

COMMONWEALTH OF PENNSYLVANIA
VS.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

Plaintiff's Statement.

This action is brought by the Commonwealth of Pennsylvania, plaintiff, to recover from the Fidelity and Deposit Company of

Maryland, defendant, the amount of a settlement, made by the Insurance Commissioner and State Treasurer of the Commonwealth aforesaid, for tax on Gross Premiums, a copy of which said settlement is hereunto attached and made part of this statement.

For that, whereas, the said defendant, on the 9th day of May, A. D., 1910, at the county of Dauphin aforesaid, was indebted to the said plaintiff in the sum of Three Hundred and Fifty-two dollars and Ninety-two cents ($352.92), lawful money of the United States, on an account examined, adjusted, settled and signed by the Insurance Commissioner and State Treasurer of this Commonwealth, and duly entered in the books of their respective offices, as authorized and required by law, on the day and year last aforesaid, in which a certain sum of money to-wit: the sum last aforesaid, is due and owing the said plaintiff from the said defendant, for tax on Gross Premiums received from business done within the State of Pennsylvania for the year ended the 31st day of December, 1909, per Act of June 28, 1895 (P. L. 408), a copy of which said account was thereafter sent by the said Insurance Commissioner, under his hand and
10 seal of office, to the said defendant, which account yet remains in full force against the said defendant and unappealed from. A demand for payment of said tax was made upon said defendant, with which demand said defendant neglects or refuses to comply.

And the said defendant company has, by its Vice President, expressly waived its right to take an appeal from the settlement herein referred to within the period allowed by law and formally consents that this action of assumpsit be immediately brought in the said court, a copy of which said waiver and consent is hereto attached and made part of this statement.

Whereby, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff to demand and have of and from the said defendant a certain sum of money, to-wit: the sum mentioned and ascertained to be due this Commonwealth in the said county so as aforesaid examined, adjusted, settled and signed by the Insurance Commissioner and State Treasurer of this Commonwealth, the said sum above mentioned with other legal charges.

Wherefore, the said Commonwealth of Pennsylvania saith that the said sum of money amounting to Three Hundred and Fifty-two Dollars and Ninety-two Cents ($352.92) still remains in arrears unpaid, unsatisfied and due the said plaintiff, wherefore she demands to have of and from the said defendant the sum last aforesaid, with an Attorney General's commission of five per cent and costs of suit, and therefore brings this action.

J. E. B. CUNNINGHAM,
Dep. Att'y General.

11 Fidelity & Deposit Company of Maryland, in Account with the Commonwealth of Pennsylvania.

DR.

To tax on Gross Premiums received from business done within the State of Pennsylvania for the year ended the 31st day of December, 1909, per Act of June 28th, 1895 (P. L. 408), based upon a report filed in the Insurance Department.

Amount received $215,846.05.

Tax at rate of 2% $4,316.92

CR.

By payment on account... ..... 3,964.00

Balance due Commonwealth..... $352.92

Insurance Department.

HARRISBURG, PA., May 9", 1910.

Settled & Entered:

SAM'L W. McCULLOCH,
Insurance Commissioner.

Treasury Department.

HARRISBURG, PA., May 9", 1910.

Approved:

J. P. GATES, *Cashier,*
For State Treasurer.

Insurance Department.

HARRISBURG, PA., May 13th, 1910.

I hereby certify, that the above is a true copy of the original remaining on file in this Department.

Witness my hand and seal of office the day and year aforesaid.

[SEAL.] SAM'L W. McCULLOCH,
Insurance Commissioner.

12 *Waiver of Right of Appeal to Common Pleas Court of Dauphin County.*

The Fidelity and Deposit Company of Maryland, above named, hereby formally waives its right to appeal to the Court of Common Pleas of Dauphin County from the above settlement for unpaid tax, within the period of sixty days allowed by law, and hereby consents that an action of assumpsit may be immediately brought in the said

court for the collection of the same. The said company, however, does not waive its right to appeal from any judgment which the said court may enter in the action herein referred to, nor does said company admit liability by executing this waiver nor that the sum of $352.92, or any part thereof, is due the State of Pennsylvania, and expressly reserves its right to contest in a Court of law the validity of said assessment on the ground that it represents a tax upon premiums received upon business done under an Act of Congress, and therefore beyond the power of taxation by the State of Pennsylvania.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By CHAS. R. MILLER, *Vice President.*

Endorsement: No. 76. Commonwealth Docket, 1910. Commonwealth vs. Fidelity & Deposit Company of Maryland. Plaintiff's Statement and Copy of Account. Filed May 16, 1910. M. Hampton Todd, Attorney General.

13 *Affidavit of Defense.*

In the Court of Common Pleas of Dauphin County.

No. 76, Commonwealth Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

STATE OF MARYLAND,
Baltimore City, To wit:

I, Howard D. Adams, a Notary Public of the State of Maryland, in and for Baltimore City aforesaid, duly commissioned and qualified, do hereby certify that Charles R. Miller, Vice President of the Fidelity and Deposit Company of Maryland, personally known to me, appeared before me this day in person and made oath in due form of law as follows:

My name *of* Charles R. Miller, and I am, and for some time have been, Vice-President of the Fidelity and Deposit Company of Maryland, and duly authorized by it to make this affidavit of defense in its behalf. The defendant, the Fidelity and Deposit Company of Maryland, has a full and complete defense to the whole of the
14 plaintiff's claim in above stated case, the nature and character of which is as follows:

The Fidelity and Deposit Company of Maryland is a corporation duly incorporated and organized under the laws of the State of Maryland, and was in full operation under all its charter powers prior to and during the year 1909; that among its charter powers it is authorized and empowered to insure the fidelity of any person, partnership, association, corporation or company holding any place or position of trust or responsibility or owing any duty, contractual or

otherwise, to any other person, partnership, association, corporation, company or to any city, county, State, territorial or foreign government, or to the United States Government, or any officer, board, commission, department or other Governmental agency of any such governments, to become — or go upon any bond, undertaking or other obligation for the faithful performance of any trust, duty, contract, obligation or agreement; to *to* become surety or go upon any bond, undertaking or other obligation — whatsoever nature, character or description, including all bonds, undertakings or other obligations permitted, required or authorized by any order, ordinance, rule, regulation or law in connection with any judicial proceeding, or with the performance of any duty imposed, or act permitted by law.

15 That said Company be and is hereby authorized and empowered to become sole surety in all cases where by law or order two or more sureties are required, and it shall be lawful for any Court, register, clerk or other officer or person whose duty it is to approve any bond or other obligation permitted, required or authorized by law or order to be executed by two or more sureties, to approve such bond or obligation when executed by said Company as sole surety.

That prior to and during the year 1909, having complied with all the provisions of the Act of Assembly of the Commonwealth of Pennsylvania entitled "An Act relative to bonds, undertakings &c." approved the 26th day of June, A. D. 1895, as well as with the requirements of the laws of the Commonwealth of Pennsylvania applicable to such company in doing business therein, the said Fidelity and Deposit Company of Maryland was duly authorized and empowered for some time prior to 1909, and during the said year, by the Insurance Commissioner of the Commonwealth of Pennsylvania by his several certificates under the seal of his office in pursuance of the Act aforesaid, to become and be accepted as sole surety on all bonds, undertakings and obligations required or permitted by law or the charter, ordinance, rules or regulations of any municipality, board, body, organization or public office in the Commonwealth of Pennsylvania according to the terms of its charter, and in conformity to the laws of said Commonwealth.

16

That under the said authority the said Fidelity and Deposit Company of Maryland did execute bonds such as are described in said Act, as sole surety during the year 1909 in the State of Pennsylvania, and did receive during the said year gross premiums thereon to the amount of one hundred and ninety-eight thousand, one hundred and ninety-nine dollars and nineteen cents ($198,199.19) the tax of 2% of which for the year 1909 has been duly paid to the Commonwealth of Pennsylvania.

The Fidelity and Deposit Company of Maryland having duly complied with the provisions, terms, conditions and requirements of the Act of Congress of August 13, 1894, Chapter 282, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," for some time prior to 1909 and during the whole of 1909, was duly granted authority to do business under the said Act of Congress by

the written certificate of the Attorney General of the United States under the seal of the Department of Justice. Under the authority granted by this Act of Congress and of its own charter, and under no other authority whatever, the Fidelity and Deposit Company of Maryland did become surety on bonds running to the United States Government, during the year 1909, in the following matters,
17 to-wit: Internal Revenue, Customs, United States Government Officials, United States Government contracts; to Banks for United States deposits, and bonds given in the Courts of the United States in litigation there pending. All of said bonds and undertakings were required by the laws of the United States and were such as are described in Section 1 of the Act of Congress of August 13th, 1894, Chapter 282, and were all executed within the territorial limits of the Judicial Districts of the Courts of the United States within the Commonwealth of Pennsylvania. The amount of gross premiums received on the aforesaid business during the year 1909, done within the limits of the Judicial Districts of the Courts of the United States within the Commonwealth of Pennsylvania, is seventeen thousand, six hundred and forty-six dollars and eighty-six cents ($17,646.86). The amount sued for by the Commonwealth of Pennsylvania in the present suit, is a tax of 2% on this amount of gross premiums of seventeen thousand, six hundred and forty-six dollars and eighty-six cents ($17,646.86) which is claimed to be due the plaintiff under and by virtue of the provisions of the Act of the Commonwealth of Pennsylvania, of June 28th, 1895.

The defendant is advised that the business was not done
18 within the Commonwealth of Pennsylvania within the meaning of the Act of Assembly of June 26th, 1895, nor was it done under any authority granted by the Commonwealth of Pennsylvania, by virtue of this or any other Act of Assembly of said Commonwealth, but was done in the Judicial Districts of the Courts of the United States within the Commonwealth of Pennsylvania, and solely and exclusively under the authority granted by the Government of the United States, through the certificate of its Attorney General, by virtue of the Act of Congress of August 13, 1894, Chapter 282, and the said attempted tax is in effect a tax on a privilege or franchise granted by the United States, and is, therefore, illegal and void and contrary to the Constitution of the United States.

The defendant, on January 29th, 1910, made its report of gross premiums received from business done within the limits of the Commonwealth of Pennsylvania for the year 1909, to the Insurance Commissioner, and in this report and in an accompanying letter of the same date, called attention to the fact that of the gross premiums reported, seventeen thousand, six hundred and forty-six dollars and eighty-six cents ($17,646.86) was premiums on bonds required by the United States Government, which were written by virtue of a license granted under the Act of Congress of August 13th, 1894, and was, therefore, not liable to such taxation. The Insurance
19 Commissioner dissented from this view, and the account for taxes was adjusted and signed by the Insurance Commissioner and State Treasurer on May 9th, 1910. In order that the question

should be promptly settled, it was agreed between the defendant and the Insurance Commissioner that the appeal within sixty days should be waived so that suit could be promptly brought by the Commonwealth. The terms of the waiver are correctly stated in the paper attached to the plaintiff's statement.

CHAS. R. MILLER,
Vice President.

As witness my hand and notarial seal, this 24th day of June 1910.

[NOTARIAL SEAL.] HOWARD D. ADAMS,
Notary Public.

My commission expires May 1st, 1912.

20 *Certificate that Howard D. Adams is a Notary Public.*

N. P. No. 137.

STATE OF MARYLAND,
Baltimore City, sct:

I, Stephen C. Little, Clerk of the Superior Court of Baltimore City, do hereby certify, that Howard D. Adams, Esquire, before whom the annexed affidavit was made, and who has hereto subscribed his name, was at the time of so doing, a Notary Public of the State of Maryland, in and for the City of Baltimore, residing in said City and State, duly commissioned and sworn, and authorized by law to administer oaths and take acknowledgements, or proof of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In testimony whereof, I hereto set my hand, and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 24th day of June, 1910.

[Seal of the Superior Court of Baltimore City.]

STEPHEN C. LITTLE,
Clerk of the Superior Court of Baltimore City.

Endorsement: In the Court of Common Pleas of Dauphin County, Commonwealth Docket 1910. No. 76. Commonwealth of Pennsylvania vs. Fidelity and Deposit Company of Maryland. Affidavit of Defense. Mr. Clerk: Please file. Frederick M. Ott, Att'y for Fidelity & Deposit Co. of Maryland. Gans & Haman. Filed June 24, 1910.

21 *Stipulation to Try Without Jury.*

In the Court of Common Pleas of Dauphin County, —— Term, 1910.

No. 76.

COMMONWEALTH OF PENNSYLVANIA
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND.

It is hereby agreed that a trial by jury be dispensed with in the above stated case, and that the same be submitted to the decision of the Court to be heard and determined under the provisions of an act, entitled "An Act to provide for the submission of civil cases to the decision of the court, and to dispense with trial by jury," approved the 22d day of April, 1874, subject, however, to a writ of error as in other cases, at the option of either party.

Nov. 17, 1910.

WM. M. HARGEST,
Ass't Deputy Attorney General.
GANS & HAMAN,
FREDERICK M. OTT,
Att'ys for Defendant.

Endorsement: No. 76. Commonwealth Docket, 1910. Commonwealth vs. Fidelity & Deposit Co. of Maryland. Stipulation to try without jury. Filed Nov. 17, 1910.

22 *Testimony.*

Dauphin County Common Pleas.

No. 76, Commonwealth Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND.

Before Hon. George Kunkel, P. J., and Hon. S. J. M. McCarrell, A. L. J., at Harrisburg, Penna., November 17, 1910.

Appearances.

For Commonwealth: Hon. M. Hampton Todd, Attorney General. Hon. J. E. B. Cunningham, Deputy Attorney General. Hon. W. M. Hargest, Ass't Deputy Attorney General.

For Defendant: Messrs. Gans & Haman. Major Frederick M. Ott.

Mr. HARGEST: If the court please, this case arose on a suit and not on an appeal and an affidavit of defense. We will file a stipulation to try it without a jury. I think I agree with counsel on the other side that it raises purely a question of law. It is for gross premiums for business done within the State of Pennsylvania for the year ending 31st December 1909. Tax on Gross Premiums, under the act of June 28, 1895, P. L. 408.

The tax is assessed upon $215,846.05, Gross premiums received from business done within the State of Pennsylvania, and amounting to $4,316.92, upon which there was a payment on account of $3,964.00, leaving a balance due the Commonwealth of $352.92.

Now the defendants set up that that business is done with persons in the employ of the Government of the United States, and who are required to give fidelity bonds by reason of their employment; and, although within the State of Pennsylvania, they say there is no right which the State of Pennsylvania confers upon this company
23 by which this business accrues to it in the State, as I understand their position, because it is business done with persons in the Federal employ. I think that is the whole question in controversy.

The COURT: The act imposed a tax on gross premiums?

Mr. HARGEST: On business done in Pennsylvania, and they say this is not business done in Pennsylvania within the meaning of the act, because it is done with persons in the employ of the Government.

By CHARLES MARKEL, Esq. (appearing for the defendant): Your Honor please, we say it is not within the act. We say if it was within the act it would be beyond the constitutional power of the State to impose that tax.

Mr. MARKEL: Your Honors please, I have not gone into the question of practice, but I assume with the Attorney General, that it will be agreed between counsel that the facts alleged in the affidavit of defence are true and in lieu of evidence?

Mr. HARGEST: We are trying it on the facts.

The COURT: You admit the facts set forth in the affidavit of defence to be true?

Mr. HARGEST: Certainly. We admit the facts set forth in the affidavit of defence, and that raises this single question.

The COURT: You offer in evidence the statement of claim?

Mr. HARGEST: Yes, and the affidavit.

The COURT: The premiums on these bonds are paid by residents of Pennsylvania who happen to be in the Federal service?

Mr. HARGEST: Yes, sir; and the whole question is whether or not by reason of the fact that they are in the Federal service exempts the company from tax.

Maj. OTT: There is another fact that the general words of the claim might seem to imply, that they owe tax on some other business. It is a fact in this case that we have paid everything in this case except——
24 Mr. HARGEST: Yes, this is the only thing in dispute.

Mr. MARKEL: Your Honors please, the substance of this case has been stated already by the Attorney General, and it pre-

sents the single issue whether or not the Fidelity Deposit Company is liable to pay a tax of two per cent. on the gross receipts of the premiums received for doing a Federal business in the State of Pennsylvania. Now of course it is important at the outset to call attention to the nature of the tax. It is not a tax on the property of the company, and we do not claim exemption from tax on the property of the company. It is a tax on the business done by this corporation. It is a tax measured by the amount of business, and it has no reference whatever to the property in this State. It has reference solely to the business of a particular class, business done in the way of writing bonds for Federal officials, and I take it, it includes receivers' bonds and court business; it includes all the business done with the Federal Government in the State of Pennsylvania. We contend we have a right to do it without the permission of the State of Pennsylvania, and furthermore, that we are authorized to do it by an act of Congress.

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.

FRANK J. ROTH,
Official Stenographer.

The foregoing record of the proceedings upon the trial of the above cause is hereby approved, and directed to be filed.

—— ——, *Judge.*

25 Endorsement: No. 76, Commonwealth Docket, '10. Commonwealth of Penna. vs. Fidelity and Deposit Company of Maryland. Filed March 13, 1913. Testimony. Frank J. Roth, Official Stenographer.

26 *Findings of Fact and Opinion of the Court of Common Pleas.*

In the Court of Common Pleas of Dauphin County.

No. 76, Commonwealth Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

By the COURT: This is an action brought by the Commonwealth of Pennsylvania against the defendant company to recover the sum of $352.92, being the balance due on a settlement made against it by the Insurance Commissioner and State Treasurer for tax on its gross premiums received from business done within this state for the tax year ending December 21, 1909. Trial by jury has been waived and the case has been submitted to us upon the statement and affidavit of defense, from which we find the following facts.

Facts.

The defendant is a corporation duly incorporated and organized under the laws of the State of Maryland, with power to become surety upon any bond, undertaking or other obligation of whatsoever nature, character or description. It was duly authorized by the Insurance Commissioner of the Commonwealth of Pennsylvania to become and be accepted as sole surety on all bonds, undertakings and obligations required or permitted by law, by the charters, ordinances, rules and regulations of any municipality, body, board, organization or public officer in the Commonwealth of Pennsylvania, according to the terms of its charter and in conformity with the laws of the Commonwealth. Act of June 26, 1895, P. L. 232. It was also duly granted authority by the Attorney General of the United States to become sole surety where theretofore one surety or two or more sureties were required by the laws of the Unitd States. During the year 1909 it became surety on bonds in the following matters, to-wit: "Internal revenue, customs, United States government officials, United States government contracts and banks
27 for United States deposits, bonds given in Courts of the United States in litigation there pending," the bonds and undertakings being required by the laws of the United States and being such as are referred to in Section 1 of the Act of Congress of August 13, 1894, Chapter 282, and all being executed within the territorial limits of the judicial districts of the Courts of the United States within the Commonwealth of Pennsylvania. The amount of the gross premiums from the business thus done during the year 1909 was $17,646.86. The Commonwealth claims in this action a tax of two per cent. on these premiums, amounting to $352.92, the claim being based on the proviso in Section 1 of the Act of Assembly of June 28, 1895, P. L. 408, which declares, "That hereafter the annual tax upon premiums of insurance companies of other states or foreign governments shall be at the rate of two per centum upon the gross premiums of every character and description received from business done within this Commonwealth within the entire calendar year preceding."

Discussion.

It cannot seriously be disputed that the execution of the bonds upon which the defendant company became surety, which it is admitted took place within the territorial limits of the judicial districts of the Courts of the United States within the Commonwealth of Pennsylvania, was business done within the state. The defendant, however, contends that it was authorized to do this business in the state by the Act of Congress of August 13, 1894, Chapter 282, and in transacting the business it was acting in connection with federal agencies in carrying on governmental functions, and that therefore it is not within the power of the Commonwealth of Pennsylvania to impose a tax upon it or in any wise to interfere with it.

This contention we are not able to adopt. The defendant company is authorized by its charter to enter into contracts of suretyship as a business. By the Act of the General Assembly of Pennsyl-
28 vania of June 26, 1895, P. L. 232, it was authorized to transact business in this state. By the Act of Congress of August 13, 1894, Chapter 282, having complied with the conditions therein set forth, it became acceptable to the federal government as a sole surety in those cases in which the federal government was interested, and in which theretofore one surety or two or more sureties were required. We find nothing in the Act of Congress to support the proposition that the defendant was authorized by it to transact its business in the state of Pennsylvania. The Act is silent as to the place where the contract of suretyship is to be entered into. True it is provided in Section 2 that no company shall do business under the provisions of the Act beyond the limits of the state or territory under whose laws it was incorporated and in which its principal office is located, until it should appoint an agent or attorney within the jurisdiction of the Court for the judicial district wherein such suretyship is to be undertaken. But the manifest object of that provision was to secure and make convenient the service of legal process upon the company. It would be a strained interpretation of the section to hold that it authorized surety companies coming within its provisions to enter a state and therein transact business without the consent of the state or without complying with the conditions or terms which the state might prescribe. On the other hand, the inference is to be drawn from the provisions of Section 5 of the Act, which declares that wherever the obligation is made it is to be treated as made in the district to which it is returnable or in which it is filed or in which the principal resided, that the federal government was not concerned about the place where the obligation was actually made. The defendant company having transacted its business in this state by consent of the state, it must comply with the conditions which the state has laid down. List vs. Com. of Pa., 118 Pa. 322; Thorne vs. Travellers Ins. Co., 80 Pa. 28; Paul vs. Virginia, 8 Wall., 410; Hooper vs. California, 155 U. S. 652; Pembina C. S. M. Co. vs. Pa., 125
29 U. S. 181; Horn S. M. Co. vs. N. Y., 143 U. S. 305. The tax which is now claimed is an exaction for the privilege of doing business in the state. Germania Life Ins. Co. vs. Com., 85 Pa. 513.

It is urged upon us that to require the defendant company to pay a tax for the privilege of doing the business in the state of becoming surety for federal officials and in federal matters is to interfere with the functions of the federal government. We are not able to see how the statute requiring the tax in question has that effect. The defendant was free to enter into the contract of suretyship with respect to all the federal matters out of which the premiums, which are made the basis of the tax, were received. It could have done so in the place of its domicil. There is no requirement that the contracts of suretyship should be entered into at any particular place. Indeed, as we have heretofore said, Section 5 of the Act renders the place where the contract is made of no consequence. The most natural place in which to make the contracts would be in the defendant's

home state. In the absence of any legislation fixing the place the fair presumption would be that the corporation's domicil, or those states wherein permission should be given it to do business, was intended to be the place. The defendant company, having preferred for its own convenience to make its contracts within the State of Pennsylvania in respect to the federal matters, rather than in its own state, may do so only on the terms which the State of Pennsylvania has fixed. It is not in a position therefore to complain that, because it may not transact what it calls federal business in the State of Pennsylvania without complying with the conditions prescribed by the state, the functions of the federal government are thus interfered with, when it may do that very business in the state of its domicil.

Nor can we understand how the defendant can be said to have been acting for the federal government at all either before or after the contracts of suretyship were entered into. The contracts were entered into at the request of the principals, not at the request of the federal government. The federal government was not interested in having this defendant company rather than another engage to answer for the conduct or the acts of its officials. If the defendant had refused to act as surety, a domestic company or an individual surety or sureties would have answered. It might just as well be said that the individual sureties required before the Act of Congress was passed were acting for the federal government in matters of this kind. They were acting for themselves and their principals. They were selected by their principals and accepted by the federal government without cost or charge to it. So was this defendant company acting when it assumed the obligation of becoming surety. It then stood in relation to the federal government as an insurer against possible loss or damage by reason of the fault of its officials. It did not undertake to perform the officials' duties. It did not exercise any governmental function. It was not in the employ of the federal government. It was in no sense an instrumentality of government.

The Act of Assembly which imposes the tax lays no tax on the bonds nor on the contracts of suretyship, and in this particular the present case is to be distinguished from the cases of Ambrosini vs. U. S., 187 U. S. 1, and Bettman vs. Warrick, 108 Fed. 46, which have been called to our attention. The tax, as we have said, is a charge for the privilege of transacting business in the state, measured by the amount of the business done. There is no obstacle in the way of the federal government accepting a corporate surety that has authority to act in the state in which it undertakes to contract, and we are not inclined to believe that the government contemplated accepting a surety company which had no such authority. The surety company could only obtain the authority by complying with the laws of the state.

31 *Conclusions of Law.*

Wherefore we conclude:

1. That the Act of June 28, 1895, under which the present tax is claimed, in no wise interferes with the functions of the federal government, so far as it applies to and affects the defendant company.

2. That the defendant company is liable for the tax imposed by that Act.

3. That the Commonwealth is entitled to recover as follows:

Tax due	$352.92
Interest	59.11
Attorney General's Commission	17.64
Total	$429.67

Accordingly judgment is directed to be entered against the defendant and in favor of the Commonwealth for the sum of $429.67, unless exceptions be filed within the time limited by law.

GEORGE KUNKEL, *P. J.*
P. J.

Endorsement: No. 76, Commonwealth Docket, 1910. Commonwealth of Pennsylvania vs. The Fidelity and Deposit Company of Maryland. Opinion. Filed March 13, 1913.

32 *Defendant's Exceptions.*

In the Court of Common Pleas of Dauphin County, Pa.

No. 76, Commonwealth Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

The Defendant, The Fidelity and Deposit Company of Maryland, by its counsel, hereby excepts to the conclusions of law contained in the opinion of the President Judge of the Court, filed on March 13, 1912, for the following reasons:

1. The Court erred in its first conclusion of law, which is as follows:

"That the Act of June 28, 1895, under which the present tax is claimed, in no wise interferes with the functions of the federal government, so far as it affects the defendant company."

2. The Court erred in its second conclusion of law, which is as follows:

"That the defendant company is liable for the tax imposed by that Act."

3. The Court erred in its third conclusion of law, which is as follows:

That the Commonwealth is entitled to receive as follows:

Tax due	$352.92
Interest	59.11
Attorney General's Commission	17.84
Total	$429.87

4. The Court erred in directing judgment to be entered against the defendant company in favor of the Commonwealth for the sum of $429.87, unless exceptions be filed within the time limited by law.

5. The Court erred in not holding that the defendant company was exempt from taxation upon its premiums for bonds written in connection with federal agencies carrying on governmental functions in the State of Pennsylvania, by virtue of the Act of Congress
33 approved on August 13, 1894, Chapter 282, referred to in the opinion of the Court.

Respectfully submitted,

FREDERICK M. OTT,
Of Counsel for Defendant.

Harrisburg, Pa., April 3, 1913.

Order of Court Overruling Defendant's Exceptions.

And now, Ap'l 4, 1913, the foregoing exceptions are overruled and judgment is directed to be entered as heretofore ordered, to which ruling the defendant excepts and at its request a bill of exceptions is sealed.

By the Court:

GEORGE KUNKEL, *P. J.*

Endorsement: No. 76, Commonwealth Docket, 1910. Commonwealth of Pennsylvania vs. The Fidelity and Deposit Company of Maryland. Exceptions by defendant to the opinion of the Court. Filed April 4, 1913. Frederick M. Ott, Attorney-at-Law, Harrisburg, Pa., 222 Market Street.

34 *Supreme Court of Pennsylvania Docket Entries.*

Among the records and proceedings of the Supreme Court of Pennsylvania, sitting in and for the Middle District, before the Hon. D. Newlin Fell, LL.D., and his associate Justices at Harrisburg, beginning on the twenty-first Monday of the year 1913, it is contained as follows to May Term, 1913:

Hon. D. Newlin Fell, Chief Justice.
" J. Hay Brown,
" S. Leslie Mestrezat,
" William P. Potter,
" John P. Elkin,
" John Stewart,
" Robert Von Moschzisker,
Justices.

William Pearson, Prothonotary.

No. 76, Commonwealth Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Appellant.

Appeal of Defendant from Judgment of Common Pleas of Dauphin County.

Apr. 22, 1913.	Appeal and affidavit filed.
	Eo die exit writ r't'ble 21st Monday of the year 1913.
May 22, 1913.	Record filed.
" 26, "	Petition for continuance to Eastern District filed.
" 28, "	Case ordered transferred to the Eastern District. Per Curiam.
Jun- 3, "	Certified to Eastern District as per above order.
Oct. 21, 1913.	Assignments of Error filed.
35	
Jan. 5, 1914.	Argued at Philadelphia.
Feb. 9, "	Judgment affirmed. Per Curiam.
	And now, February 14th, 1914, the Prothonotary of the Court is directed to retain the record in this cause for a period of sixty days, until the appellant has an opportunity to apply to the Supreme Court of the United States for a writ of error. No remittitur to issue in the meantime. Per Curiam.
Feb. 16, 1914.	Assignments of Error filed.
Mar. 10, "	Petition for writ of error to Supreme Court of the United States filed.
Mar. 10, 1914.	Writ of error from said Court allowed by Hon. Mahlon Pitney; and Citation from Hon. Mahlon Pitney accepted by Hon. Wm. M. Hargest, Second Deputy Attorney General of Pennsylvania filed Mar. 12, 1914.
Mar. 10, 1914.	Writ of error bond in the sum of $1,500.00 filed. Certified from the record.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON, *Prothonotary.*

Affidavit and Appeal.

36 In the Supreme Court of Pennsylvania for the Middle District.

In the Court of Common Pleas of the County of Dauphin.

Commonwealth Docket, 1910, No. 76.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff,

—.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendant, Appellant.

Enter Appeal on behalf of Defendant from the judgment of the Court of Common Pleas of the county of Dauphin, entered on April 4, 1913.

To William Pearson, Proth'y Sup. Ct. Middle District.

FREDERICK M. OTT.

STATE OF PENNSYLVANIA,
County of Dauphin, ss:

Frederick M. Ott being duly sworn saith that the above Appeal is not intended for delay, but because he firmly believes that the defendant has suffered injustice by the judgment from which he desires to appeal.

FREDERICK M. OTT.

Sworn and subscribed before me this 22d day of April A. D. 1913.

HOMER HUMMEL STRICKLER,
Deputy-Prothonotary of Supreme Court, Middle District.

[Seal of the Supreme Court of Pennsylvania, Middle District.]

37 Endorsement: No. 29. May Term, 1913. Supreme Court of Pennsylvania, Middle District. Appeal and Affidavit. Commonwealth of Pennsylvania vs. Fidelity & Deposit Company of Maryland, Appellant. Frederick M. Ott, Attorney for Appellant. —— ——, Attorney for Appellee. Filed in Supreme Court Apr. 22, 1913, Middle District. Writ of Certiorari from Supreme Court of Pennsylvania.

38 MIDDLE DISTRICT OF PENNSYLVANIA, *ss:*

[Seal of the Supreme Court of Pennsylvania, Middle District.]

The Commonwealth of Pennsylvania to the Justices of the Court of Common Pleas for the County of Dauphin, Greeting:

We being willing, for certain causes, to be certified of the appeal of Fidelity and Deposit Company of Maryland from the judgment of said court in the case wherein Commonwealth of Pennsylvania

is Plaintiff and the said appellant Defendant, to No. 76, Commonwealth Docket, 1910, before you or some of you depending, do command you, That the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court, at a Supreme Court to be holden at Harrisburg, in and for the Middle District of said Commonwealth, on the 21st Monday of the year, 1913, being the 1st Monday of the Term, so full and entire as in our Court before you they remain, you certify and send together with this writ; that we may further cause to be done thereupon, what of right and according to our laws of the said State ought.

Witness, The Honorable D. Newlin Fell, Doctor of Laws, Chief Justice of our Supreme Court, at Harrisburg, the 22nd day of April, in the year of our Lord, one thousand nine hundred and thirteen, and of the Commonwealth the 137th.

WILLIAM PEARSON, *Prothonotary.*

39 *Endorsement.*

The Record and process, with all things touching the same, so full and entire as before us, they remain to the Honorable the Judges of the Supreme Court of Pennsylvania, sitting in and for the Middle District, we certify and send as within we are commanded.

GEORGE KUNKEL, *P. J.* [L. S.]
——— ———. [L. S.]
——— ———. [L. S.]

76 Com'th Dk. 1910. No. 29. May Term, 1913. Supreme Court, Middle District. Commonwealth of Pennsylvania vs. Fidelity and Deposit Company of Maryland, Appellant. Certiorari to the Court of Common Pleas for the County of Dauphin. Returnable the 21st Monday of the year, 1913. "Rule on the Appellee to appear and plead on the return day of the writ." Filed in Supreme Court May 22, 1913, Middle District. N. B.—20 days' notice to the parties or their Counsel below necessary to compel an appearance. Filed Apr. 22, 1913. Costs $12.—p'd by F. M. Ott, Esq.

40 *Bond.*

In the Court of Common Pleas for the County of Dauphin, State of Pennsylvania.

No. 76, Commonwealth Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

Appeal of Fidelity and Deposit Company of Maryland, Defendant, from the Judgment of said Court of Common Pleas of Dauphin County, Pa., Entered April 4, 1913.

Know all Men by these Presents, That we, the Fidelity and Deposit Company of Maryland, Defendant, and American Bonding

Company of Baltimore, Surety, are held and firmly bound unto the Commonwealth of Pennsylvania, to the use of all parties interested, in the sum of One Thousand ($1,000.00) dollars, lawful money of the United States, to be paid to the said Commonwealth, to the use of the party or parties entitled thereto or their certain executors, administrators or assigns, being double the amount of said order, judgment or decree, and all costs accrued and likely to accrue, to which payment, well and truly to be made and done, we do bind ourselves, our heirs, executors and administrators, and every of them, firmly by these presents.

Sealed with our seals and dated this 22d day of April A. D. 1913.

Whereas, the said Fidelity and Deposit Company of Maryland, Defendant, has appealed to the Supreme Court of Pennsylvania from the judgment of the Court — Common Pleas of the County of Dauphin, in the above stated suit or proceeding. Now the condition of this obligation is such, that if the said Appellant will prosecute this Appeal with effect, and will pay all costs and damages awarded by the Appellate Court, or legally chargeable against it, then this obligation to be void; otherwise to remain in full force and virtue.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By CHAS. R. MILLER, *Vice-Pres.* [L. S.]

Attest:
WM. M. BISHOP, *Asst. Secy.* [L. S.]

[Seal of Fidelity & Deposit Company of Maryland]

AMERICAN BONDING COMPANY OF BALTIMORE, [L. S.]
By MILLORD LEONARD, *Vice-President.*

Attest:
ALEX. COULTER, *Asst. Secy.*

[Seal of American Bonding Company of Baltimore.]

Signed, Sealed and delivered in the presence of—
—— ——.

41 Endorsement.

STATE OF PENNSYLVANIA,
County of Dauphin, ss:

G. L. Cullmerry, being by me duly sworn according to law, saith that the American Bonding Company of Baltimore, the Surety upon the within bond, is worth the sum of one thousand dollars, over and above all its debts and liabilities and the debtor's exemption.

G. L. CULLMERRY.

Witness my hand and Notarial seal, the 26th day of April, 1913.
My commission will expire on Jan'y 21, 1917.
Sworn and subscribed to:

HARRY M. BRETZ, [NOTARIAL SEAL.]
Notary Public.

No. 76 Commonwealth Docket, 1910. Commonwealth of Penna. v. Fidelity and Deposit Company of Maryland. Bond. April 26, 1913, the surety on the within bond is approved. By the Court, Sam'l J. M. McCarrell, J. Filed Apr. 26, 1913. Bond on appeal to the — Court of Penna.

42 In the Supreme Court of Pennsylvania.

No. 29 of May Term, 1913.

COMMONWEALTH OF PENNSYLVANIA
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, Appellant.

Assignments of Error.

First. The Court erred in overruling the exception of the defendant to its first conclusion of law, which exception and the action of the Court thereon were as follows:

"1st. The Court erred in its first conclusion of law, which is as follows:

"That the Act of June 28th, 1895, under which the present tax is claimed in no wise interferes with the functions of the Federal Government so far as it affects the defendant Company."

And now April 4th, 1913, the foregoing exceptions are overruled and judgment is directed to be entered as hereinbefore ordered; to which ruling the defendant excepts and at its request a bill of exceptions is sealed.

By the Court:

GEO. KUNKEL, *P. J.*"

Second. The Court erred in overruling the exception of the defendant to its second conclusion of law, which exception and the action of the Court thereon were as follows:

"2nd. The Court erred in its second conclusion of law, which is as follows:

43 "That the defendant Company is liable for the tax imposed by that Act."

And now April 4th, 1913, the foregoing exceptions are overruled and judgment is directed to be entered as hereinbefore ordered; to which ruling the defendant excepts and at its request a bill of exceptions is sealed.

By the Court:

GEO. KUNKEL, *P. J.*

Third. The Court erred in overruling the exception of the defendant to the third conclusion of law, which exception and the action of the Court thereon were as follows:

3rd. The Court erred in its third conclusion of law, which is as follows:

"That the Commonwealth is entitled to receive as follows:

Tax due	$352.92
Interest	59.11
Attorney General's Commission	17.84
	$429.87

And now April 4th, 1913, the foregoing exceptions are overruled and judgment is directed to be entered as hereinbefore ordered; to which ruling the defendant excepts and at its request a bill of exceptions is sealed.

By the Court:

GEO. KUNKEL, *P. J.*

Fourth. The Court erred in overruling the exception of the defendant to its action in directing judgment to be entered against the defendant, which exception and the action of the Court thereon were as follows:

"4th. The Court erred in directing judgment to be entered
44 against the defendant company in favor of the Commonwealth for the sum of $429.87 unless exceptions be filed within the time limited by law."

And now April 4th, 1913, the foregoing exceptions are overruled and judgment is directed to be entered as hereinbefore ordered; to which ruling the defendant excepts and at its request a bill of exceptions is sealed.

By the Court:

GEO. KUNKEL, *P. J.*

Fifth. The Court erred in overruling the fifth exception of the defendant, which exception and the action of the Court thereon were as follows:

"5th. The Court erred in not holding that the defendant Company was exempt from taxation upon its premiums for bonds written in connection with Federal agencies carrying on governmental functions in the State of Pennsylvania, by virtue of the Act of Congress approved August 13th, 1894, Chapter 282, referred to in the opinion of the Court.

And now April 4th, 1913, the foregoing exceptions are overruled and judgment is directed to be entered as hereinbefore ordered; to which ruling the defendant excepts and at its request a bill of exceptions is sealed.

By the Court:

GEO. KUNKEL, *P. J.*

Sixth. The Court erred in directing that judgment be entered for the Commonwealth in the following order:

"And now April 4th, 1913, the foregoing exceptions are overruled and judgment is directed to be entered as hereinbefore ordered; to which ruling the defendant excepts and at its request a bill of exceptions is sealed.

By the Court:

GEO. KUNKEL, *P. J.*"

Seventh. The Court erred in not entering judgment for the defendant.

FREDERICK M. OTT,
CHARLES F. PATTERSON,
Attorneys for Appellant.

Endorsement: No. 29 of May Term, 1913. Commonwealth of Pennsylvania vs. Fidelity & Deposit Company of Maryland. Assignments of error. Filed in Supreme Court, Middle District, Oct. 21, 1913.

Opinion of the Supreme Court of Pennsylvania.

In the Supreme Court of Pennsylvania, Middle District, May Term, 1913.

No. 29.

COMMONWEALTH OF PENNSYLVANIA
v.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, Appellant.

Appeal from Court of Common Pleas of Dauphin County.

Per Curiam:

The judgment appealed from is affirmed on the findings and opinion by the learned President Judge of the Common Pleas.

Opinion filed February 9, 1914.

COMMONWEALTH OF PENNSYLVANIA,
County of Dauphin, sct:

I, William Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the middle District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Commonwealth of Pa. vs. Fidelity & Deposit Co. of Maryland, at No. 29 of May Term, 1913, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, at Harrisburg, in the County of Dauphin, in the said Middle District of Pennsylvania, this 16th day of February in the year of our Lord One Thousand Nine Hundred and fourteen.

[Seal Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary.

48 Endorsement: No. 29, May Term, 1913. Commonwealth of Pennsylvania vs. Fidelity & Deposit Company of Maryland, Appellant. Certificate Opinion.

Order to Hold Record.

In the Supreme Court of Pennsylvania, Middle District, May Term, 1913.

No. 29.

COMMONWEALTH OF PENNSYLVANIA
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, Appellant.

And now, February 14th, 1914, the Prothonotary of the Court is directed to retain the record in this cause for a period of sixty days, until the Appellant has an opportunity to apply to the Supreme Court of the United States for a writ of error. No remittitur to issue in the meantime.

PER CURIAM.

Endorsement: No. 29, May Term, 1913. Commonwealth of Pennsylvania vs. Fidelity & Deposit Company of Maryland, Appellant. Order. Filed in Supreme Court Feb. 16, 1914.

49 *Return to Writ of Error from Supreme Court of the United States.*

And now here on this day, to-wit March 10th, 1914, the said Fidelity and Deposit Company of Maryland produced to the Supreme Court of Pennsylvania here the writ of the United States of America for the correcting of errors of and upon the said premises, commanding the record and proceedings aforesaid of the judgment aforesaid so as aforesaid rendered, with all things touching the same, to be transmitted to the Supreme Court of the United States to be held at the city of Washington within thirty days from the date of the said writ, viz. March 6th, 1914, which writ of error is hereunto annexed.

In pursuance whereof, and according to the form and effect of

the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

Petition for Writ of Error.

50 In the Supreme Court of the United States.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Plaintiff in Error,
vs.
COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

Petition for Writ of Error.

To the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States for the Third Circuit:

The Petition of Fidelity and Deposit Company of Maryland respectfully represents:

That on May 14, 1914, the Commonwealth of Pennsylvania commenced suit against your petitioner in the Court of Common Pleas of Dauphin County, Pennsylvania as of No. 76 Commonwealth Docket 1910 to recover the sum of $352.92, with interest and Attorney General's commission, that sum being the balance due on a tax settlement made against your petitioner by the Insurance Commissioner and the State Treasurer of the Commonwealth of Pennsylvania as a tax on the gross premiums received by your petitioner from business done by it within the State of Pennsylvania for the tax year ending December 31, 1909.

Your petitioner is a Maryland corporation engaged in writing bonds and other undertakings, guaranteeing the fidelity of individuals and bonds of like character and was duly authorized by the Insurance Commissioner of the Commonwealth of Pennsylvania to become and be accepted as sole surety on all bonds, undertakings and obligations required or permitted by law, in accordance with the Act of Assembly of the Commonwealth of Pennsylvania, ap-
51 proved June 26, 1895, P. L. 232. It was also duly authorized by the Attorney General of the United States to become sole surety where theretofore one surety or two or more sureties were required by the laws of the United States. The amount of gross premiums received by your petitioner upon bonds executed by it during the year 1909 in the State of Pennsylvania was $198,199.19 and upon this sum it paid to the Commonwealth of Pennsylvania a tax of 2%, in conformity with the Act of Assembly of the Commonwealth of Pennsylvania, approved June 28, 1895, P. L. 408.

In addition to the gross amount of premiums so received by your petitioner it also received gross premiums amounting to $17,646.82, such premiums being received by it on account of bonds executed by it in the following matters, to-wit:

"Internal Revenue, Customs, United States Government Officers, United States Government Contracts and banks for United States Deposits, bonds given in Courts of the United States in litigation there pending."

These bonds and undertakings being required by the laws of the United States and being such as are referred to in Section 1 of the Act of Congress of August 13, 1894, Chapter 282 and all being executed within the territorial limits of the Judicial Districts of the Courts of the United States within the Commonwealth of Pennsylvania.

The Commonwealth at the trial based its claim to recover upon Section 1 of the Act of Assembly of June 28, 1895, P. L. 408, which section imposes an annual tax of 2% upon the gross premiums of every character and description received by insurance companies of other states upon business done within the Commonwealth of Pennsylvania within the calendar year preceding the settlement.

Your petitioner at the trial claimed that it was exempt from taxation by the Commonwealth of Pennsylvania upon the premiums received by it on bonds of the character above described written within the territorial limits of the Judicial Districts of the United States Courts in the Commonwealth of Pennsylvania, because the business so done was written by it under the authority of the Act of Congress of August 13, 1894, Chapter 282, it having been approved by the Attorney General of the United States in accordance with the provisions of that Act.

52 The two judges of the Court of Common Pleas of Dauphin County, Pa., before whom the case was tried without a jury, under the provisions of the Pennsylvania Statutes permitting that practice, overruled the contention of the defendant in this regard and held that notwithstanding the Act of Congress above referred to that the Commonwealth of Pennsylvania was entitled to recover the tax of 2% upon the Federal business so written by your petitioner within the State of Pennsylvania and directed that judgment should be entered against your petitioner for the amount of said tax of $352.92, together with interest and a commission for the Attorney General of Pennsylvania at five per cent.

Thereafter upon April 4, 1813 exceptions were filed by your petitioner to the findings of fact and conclusions of law of the Court of Common Pleas of Dauphin County, Pa., which exceptions were on the same day overruled and judgment was accordingly directed to be entered against your petitioner for $429.67.

On April 22, 1913 your petitioner appealed from said judgment to the Supreme Court of Pennsylvania as of May Term, 1913, No. 29 and on the 9th day of February 1914 the said Supreme Court affirmed the judgment.

The said judgment of the Supreme Court of Pennsylvania, recovered in the Eastern District thereof to which the case was by order of that Court transferred from the Middle District, is a final judgment in the highest Court of the State of Pennsylvania in which a decision in the said suit could be had.

In the said action rights, privileges and immunities were claimed

by your petitioner under the Statutes of the United States and under authority exercised under the United States and the decision of the said Supreme Court of Pennsylvania was against the rights, privileges and immunities specially set up and claimed under said statutes and authority.

Wherefore your petitioner prays for the allowance of a Writ of Error from the Supreme Court of the United States to the Supreme Court of Pennsylvania, in order that said judgment may be reexamined and reversed in the Supreme Court of the United States and that the said Writ of Error may be a supersedeas.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By V. L. P. SHRIVER, *Vice President.*

53 V. L. P. Shriver, being duly sworn according to law, deposes and says that he is Vice President of the Fidelity and Deposit Company of Maryland, the above petitioner, and on its behalf says that the facts set forth in the above petition are true to the best of his knowledge and belief.

V. L. P. SHRIVER.

Sworn and subscribed before me this 26th day of February, 1914.
[NOTARIAL SEAL.] W. F. AMES,
Notary Public.

My commission expires March 25, 1917.

And now, to-wit, March sixth, 1914, Writ of Error as prayed for allowed, the same to be a supersedeas; and citation awarded.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

Endorsement: In the Supreme Court of the United States. Fidelity & Deposit Company of Maryland, Plaintiff in Error, vs. Commonwealth of Pennsylvania, Defendant in Error. Petition for Writ of Error. Filed in Supreme Court Mar. 10, 1914, Middle District. Writ of Error Bond.

54 453,392–14.

Know all Men by these Presents, That we, Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, as principal, and the United States Fidelity & Guaranty Company, as sureties, are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of Fifteen Hundred ($1,500.00) dollars, to be paid to the said Commonwealth of Pennsylvania, its certain attorney, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-first day of February, in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately at an argument in a suit depending in said Court, between Commonwealth of Pennsylvania and Fidelity and Deposit Company of Maryland, a judgment of $429.67 was rendered against the said Fidelity and Deposit Company of Maryland and the said Fidelity and Deposit Company of Maryland having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth of Pennsylvania citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Fidelity and Deposit Company of Maryland shall prosecute said Writ of Error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By FRED S. AXTEN, *Vice Pres't.* [SEAL.]

Attest:
WM. M. BISHOP, [SEAL.]
Ass't Sec'y.

UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]
By W. W. BYMINGHAM, *Vice-President.*

Attest:
WM. F. MORGAN,
Ass't Secretary.

Sealed and delivered in presence of—
CHARLES F. PATTERSON.

Approved by—
MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

55 Endorsement: Filed in Supreme Court. Mar. 10, 1914, Middle District.

Certificate.

STATE OF PENNSYLVANIA,
County of Dauphin, ss:

In testimony that the foregoing, contained on pages one to fifty-six inclusive, is a full, true, and correct copy of the record and proceedings of the Supreme Court of Pennsylvania, the highest court of law and equity of the State of Pennsylvania, in the case lately depending therein, to No. 29, May Term, 1913, Middle District, wherein The Commonwealth of Pennsylvania was plaintiff below and appellee and the Fidelity and Deposit Company of Maryland

was defendant below and appellant, I have hereunto subscribed my name and affixed the seal of the said Supreme Court, at Harrisburg, this twenty-fifth day of March, A. D., 1914.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary of Supreme Court, Middle District.

56 In the Supreme Court of Pennsylvania, Middle District, Transferred to the Eastern District, Sitting at Philadelphia, May Term, 1913.

No. 29.

COMMONWEALTH OF PENNSYLVANIA
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, Appellant.

Assignments of Error.

On this 17th day of February A. D. 1914 comes Fidelity & Deposit Company of Maryland, Appellant in the Supreme Court of Pennsylvania and Plaintiff in Error in the Supreme Court of the United States, by Charles F. Patterson, its Attorney, and says that in the record and proceedings, the decision and final judgment of the Supreme Court of Pennsylvania, there is manifest error in this, to-wit:

1. The Supreme Court erred in affirming the judgment of the Court of Common Pleas of Dauphin County, Pennsylvania and in overruling Appellant's First Specification of Error, which was as follows:

"1st. The Court erred in overruling the exception of the defendant to its first conclusion of law, which exception and the action of the Court thereon were as follows:

'1st. The Court erred in its first conclusion of law, which is as follows:

That the Act of June 28th, 1895, under which the present tax is claimed in no wise interferes with the functions of the Federal Government so far as it affects the defendant Company.

And now April 4th, 1913, the foregoing exceptions are overruled and judgment is directed to be entered as hereinbefore ordered; to which ruling the defendant excepts and at its request a bill of exceptions is sealed.

By the Court.

GEO. KUNKEL, *P. J.*'"

57 And the said Fidelity & Deposit Company of Maryland in support of the said exception and of the said Specification of Error claimed that the Act of Assembly of the Commonwealth of Pennsylvania, approved June 28, 1895, was in conflict with the Act

of Congress, approved August 13, 1894, Chapter 282, 28 Statutes at Large, 279, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," and the regulations of the Attorney General of the United States made in pursuance thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the Constitution and Statutes of, and authority exercised under, the United States, specially set up and claimed by the said Fidelity & Deposit Company of Maryland.

2. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Common Pleas of Dauphin County, Pennsylvania and in overruling Appellant's Second Specification of Error, which was as follows, to-wit:

"2nd. The Court erred in overruling the exception of the defendant to its second conclusion of law, which exception and the action of the Court thereon were as follows:

"2nd. The court erred in its second conclusion of law, which is as follows:

That the defendant Company is liable for the tax imposed by that Act.

And now April 4th, 1913 the foregoing exceptions are overruled and judgment is directed to be entered as hereinbefore ordered; to which ruling the defendant excepts and at its request a bill of exceptions is sealed.

By the Court:

GEO. KUNKEL, *P. J.*'"

And the said Fidelity & Deposit Company of Maryland in support of said exception and assignment of error claimed that the said Appellant was not liable to the Commonwealth of Pennsylvania for the tax attempted to be imposed by the Act of Assembly of Pennsylvania, approved June 28, 1895, because the said Act was in conflict with the Act of Congress, approved August 13, 1894, Chapter 282, 28 Statutes at Large, 279, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," and the regu-
58 lations of the Attorney General of the United States made in pursuance thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the Constitution and Statutes of, and authority exercised under, the United States, specially set up and claimed by the said Fidelity & Deposit Company of Maryland.

3. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Common Pleas of Dauphin County and in overruling Appellant's Third Specification of Error, which was as follows, to-wit:

"3rd. The Court erred in overruling the exception of the defendant to its third conclusion of law, which exception and the action of the Court thereon were as follows:

'3rd. The Court erred in its third conclusion of law, which is as follows:

That the Commonwealth is entitled to receive as follows:

Tax due	$352.92
Interest	59.11
Attorney General's commission	17.84
	$429.87

And now April 4th, 1913, the foregoing exceptions are overruled and judgment is directed to be entered as hereinbefore ordered; to which ruling the defendant excepts and at its request a bill of exceptions is sealed.

By the Court:

GEO. KUNKEL, *P. J.*'"

And the said Fidelity & Deposit Company of Maryland in support of said exception and assignment of error claimed that the Appellant was not liable for the tax attempted to be imposed by the Act of Assembly of Pennsylvania, approved June 28, 1895, because the said Act was in conflict with the Act of Congress, approved August 13, 1894, Chapter 282, 28 Statutes at Large, 279, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," and the regulations of the Attorney General of the United States made in pursuance thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the Constitution and Statutes of, and authority exercised under, the United States, specially set up, and claimed by the said Fidelity & Deposit Company of Maryland.

4. The Supreme Court of Pennsylvania erred in affirming
59 the judgment of the Court of Common Pleas of Dauphin County, Pennsylvania and in overruling Appellant's Fourth Specification of Error, which was as follows, to-wit:

"4th. The Court erred in overruling the exception of the defendant to its action in directing judgment to be entered against the defendant, which exception and the action of the Court thereon were as follows:

'4th. The Court erred in directing judgment to be entered against the defendant Company in favor of the Commonwealth for the sum of $429.87 unless exceptions be filed within the time limited by law.

And now April 4th, 1913 the foregoing exceptions are overruled and judgment is directed to be entered as hereinbefore ordered; to which ruling the defendant excepts and at its request a bill of exceptions is sealed.

By the Court:

GEO. KUNKEL, *P. J.*'"

And the said Fidelity & Deposit Company of Maryland in support of said exception and assignment of error claimed that the said Appellant was not liable to the Commonwealth of Pennsylvania for the tax attempted to be imposed by the Act of Assembly of Pennsylvania, approved June 28, 1895, because the said Act was in conflict with the Act of Congress, approved August 13, 1894, Chapter 282, 28 Statutes at Large, 279, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow corporations to be accepted as surety thereon," and the regulations of the Attorney General of the United States made in pursuance thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the Constitution and Statutes of, and authority exercised under, the United States, specially set up and claimed by the said Fidelity & Deposit Company of Maryland.

5. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Common Pleas of Dauphin County, Pennsylvania and in overruling Appellant's Fifth Specification of Error, which was as follows, to-wit:

"5th. The Court erred in overruling the fifth exception of the defendant, which exception and the action of the Court thereon were as follows:

'5th. The Court erred in not holding that the defendant Company was exempt from taxation upon its premiums for bonds written in connection with Federal agencies carrying on governmental functions in the State of Pennsylvania, by virtue of the Act of Congress approved August 13th, 1894, Chapter 282, referred to in the opinion of the Court.

And now April 4th, 1913, the foregoing exceptions are overruled and judgment is directed to be entered as hereinbefore ordered; to which ruling the defendant excepts and at its request a bill of exceptions is sealed.

By the Court:

GEO. KUNKEL, *P. J.*'"

And the said Fidelity & Deposit Company of Maryland in support of said exception and assignment of error claimed that the said Appellant was not liable to the Commonwealth of Pennsylvania, for the tax attempted to be imposed by the Act of Assembly of Pennsylvania, approved June 28, 1895, because the said Act was in conflict with the Act of Congress, approved August 13, 1894, Chapter 282, 28 Statutes at Large, 279, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," and the regulations of the Attorney General of the United States made in pursuance thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the Constitution and Statutes of, and authority exercised under, the United States, specially set up and claimed by the said Fidelity & Deposit Company of Maryland.

6. The Supreme Court of Pennsylvania erred in affirming the

judgment of the Court of Common Pleas of Dauphin County, Pennsylvania and in overruling Appellant's Sixth Specification of Error, which was as follows, to-wit:

"6th. The Court erred in directing that judgment be entered for the Commonwealth in the following order:

'And now April 4th, 1913, the foregoing exceptions are overruled and judgment is directed to be entered as hereinbefore ordered; to which ruling the defendant excepts and at its request a bill of exceptions is sealed.

By the Court:

GEO. KUNKEL, *P. J.*'"

And the said Fidelity & Deposit Company of Maryland in support of said exception and assignment of error claimed that the said Appellant was not liable to the Commonwealth of Pennsylvania for the tax attempted to be imposed by the Act of Assembly of
61 Pennsylvania, approved June 28, 1895, because the said Act was in conflict with the Act of Congress, approved August 13, 1894, Chapter 282, 28 Statutes at Large, 279, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," and the regulations of the Attorney General of the United States made in pursuance thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the Constitution and Statutes of, and authority exercised under, the United States, specially set up and claimed by the said Fidelity & Deposit Company of Maryland.

7. The Supreme Court of Pennsylvania erred in affirming the judgment and in overruling the Appellant's Seventh Specification of Error, which was as follows, to-wit:

"7th. The Court erred in not entering judgment for the defendant."

And the said Fidelity & Deposit Company of Maryland in support of said assignment of error claimed that the said Appellant was not liable to the Commonwealth of Pennsylvania for the tax attempted to be imposed by the Act of Assembly of Pennsylvania, approved June 28, 1895, because the said Act was in conflict with the Act of Congress, approved August 13, 1894, Chapter 282, 28 Statutes at Large, 279, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," and the regulations of the Attorney General of the United States made in pursuance thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the Constitution and Statutes of, and authority exercised under, the United States, specially set up and claimed by the said Fidelity & Deposit Company of Maryland.

Wherefore for these manifest errors appearing in the record, the said Fidelity & Deposit Company of Maryland, Appellant in the Supreme Court of Pennsylvania and Plaintiff in Error of the Supreme Court of the United States, prays that the judgment of the

said Supreme Court of Pennsylvania be reversed and set
62 aside and that judgment be rendered granting it its rights under the Constitution and laws of the United States.

CHARLES F. PATTERSON,
Of Counsel for Fidelity & Deposit Company of Maryland, Appellant.

Endorsement: In the Supreme Court of Pennsylvania, Middle District, Transferred to the Eastern District, Sitting at Philadelphia, May Term, 1913. No. 29. Commonwealth of Pennsylvania vs. Fidelity & Deposit Company of Maryland, Appellant. Assignments of Error. Filed in Supreme Court, Middle District. Feb. 19, 1914.

63 [Endorsed:] Supreme Court of the United States. The Fidelity & Deposit Company of Maryland, Plaintiff in Error, vs. The Commonwealth of Pennsylvania. Transcript of Record.

Endorsed on cover: File No. 24,130. Pennsylvania Supreme Court. Term No. 114. The Fidelity and Deposit Company of Maryland, plaintiff in error, vs. The Commonwealth of Pennsylvania. Filed March 27, 1914. File No. 24,130.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

No. 14

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Plaintiff in Error,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Defendant in Error.

[illegible]

BRIEF FOR DEFENDANT IN ERROR.

[illegible]

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TABLE OF CASES CITED.

TABLE OF STATUTES CITED.

(A) Statutes of the United States.

(B) Statutes of Pennsylvania.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

No. 114

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Plaintiff in Error,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

In Error to the Supreme Court of the State of Pennsylvania.

BRIEF FOR PLAINTIFF IN ERROR.

The sole question in this case is, **"Can the State of Pennsylvania,** consistently with the Constitution of the United States, **subject a Maryland surety company** (which does business in Pennsylvania, and has paid, on all non-Federal business done by it in Pennsylvania, the full tax demanded) **to a tax, at the rate of two per cent. of its gross premiums received therefrom, on the occupation or privilege of carrying on business,** within the territorial limits of Pennsylvania, **under the Act of Congress** of August 13, 1894, c. 282 (28 Stat. 279), **viz, executing,** as surety, **bonds to the United States Government required by the laws of the United States?"**

The Supreme Court of Pennsylvania having answered this question in the affirmative, the case is brought here on writ of error.

STATEMENT OF THE CASE.

No facts are, or have been, in dispute in this case. This was an action brought on May 14th, 1910, in the Court of Common Pleas of Dauphin County, by the State of Pennsylvania against the plaintiff in error (hereinafter called the defendant), to recover the sum of $352.92, claimed as tax, under Act of June 28, 1895 (P. L. 408), sec. 1, of two per cent. upon the gross premiums received from the Federal business above mentioned done during the year 1909 (Record, pages 3, 4-5). The defendant filed its affidavit of defense, stating that it had paid the tax on all non-Federal business, setting forth the facts concerning the Federal business in question, and denying liability for the tax claimed, on the ground that such tax is "illegal and void and contrary to the Constitution of the United States" (Record, pages 7-10). The case was heard on November 17th, 1910, trial by jury being waived (Record, page 11), the State in open court admitting the facts set forth in the affidavit of defence to be true (Record, pages 11-12). On March 13th, 1913, the Court of Common Pleas filed its findings of fact and opinion, holding constitutional the tax claimed (Record, pages 13-17). Judgment was entered on April 4th, 1913, for the amount claimed, exceptions being duly reserved by the defendant (Record, pages 17-18). An appeal was then taken to the Supreme Court of Pennsylvania, which, on February 9th, 1914, affirmed the judgment appealed from, "on the findings and opinion by the learned President Judge of the Common Pleas" (Record, page 25; 244 Pa. St. 67). To review this judgment of affirmance, the present writ of error was allowed by Mr. Justice Pitney (Record, pages 1, 29).

Facts.

"The defendant is a corporation duly incorporated and organized under the laws of the State of Maryland, with power to become surety upon any bond, undertaking or other obligation of whatsoever nature, character or description." (Findings of Fact and Opinion; Record, page 14.)

Prior to and during the year 1909, having complied with the provisions of the applicable Pennsylvania statute (Act of June 26, 1895, P. L. 232), the defendant was duly authorized by the Insurance Commissioner of Pennsylvania to become sole surety on all bonds, etc., required or permitted by law or by the charter, ordinances, rules or regulations of any municipality, body, board, organization or public officer in the Commonwealth of Pennsylvania, according to the terms of its charter, and in conformity with the laws of Pennsylvania. Under this authority the defendant, during the year 1909, executed, in the State of Pennsylvania, non-Federal bonds on which it received gross premiums amounting to $198,199.19. The tax of two per cent. upon such gross premiums, viz, $3,964.00, was duly paid before this suit was instituted. (Record, pages 8, 14.)

Prior to and during the year 1909, the defendant, having duly complied with the provisions of the Act of Congress of August 13, 1894, c. 282 (28 Stat. 279), entitled "An Act relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon," was, pursuant to Section 3 thereof, duly "granted authority in writing" by the Attorney-General of the United States "to do business under this Act," *i. e.*, to execute as sole surety "any recognizance, stipulation, bond or undertaking * * * by the laws of the United States required or permitted to be given." (Sec. 1.) (Record, pages 8, 14.) Under the authority so granted by and pursuant to this Act of Congress, the defendant, "during the year 1909

* * * became surety on bonds" running to the United States Government "in the following matters, to wit: 'Internal revenue, customs, United States Government officials, United States Government contracts and banks for United States deposits, bonds given in courts of the United States in litigation there pending,' the bonds and undertakings being *required by the laws of the United States* and being *such as are referred to in Section 1 of the Act of Congress* of August 13, 1894, Chapter 282, and all being executed within the territorial limits of the judicial districts of the Courts of the United States within the Commonwealth of Pennsylvania. The amount of the gross premiums from the *business thus done* during the year 1909 was $17,646.86. The Commonwealth claims in this action a tax of 2 per cent. on these premiums, amounting to $352.92, the claim being based on the proviso in Section 1 of the Act of Assembly of June 28, 1895, P. L. 408, which declares, 'That hereafter the annual tax upon premiums of insurance companies of other States or foreign governments shall be at the rate of two per centum upon the gross premiums of every character and description received from business done within this Commonwealth within the entire calendar year preceding.'" (Italics ours.) (Findings of Fact, Record, page 14; Record, page 9.)

The Pennsylvania Statute.

The Act of June 28, 1895 (P. L. 408), Sec. 1, by which the tax claimed in this case is imposed, has recently been before this Court. (*Equitable Life Society vs. Pennsylvania*, 238 U. S. 143.) It provides:

> "That hereafter it shall be the duty of the president, secretary or other proper officer of each and every insurance company or association, incorporated by or under any law of this Commonwealth, * * * to make report in writing to the auditor general, semi-annually, upon the first days of July and January in each year, setting forth the entire amount of premiums and assessments

> received by such company or association during the preceding six months, whether said premiums and assessments were received in money or in the form of notes, credits or other substitutes for money; and every such company or association shall pay into the State Treasury, semi-annually on the last days of January and July, in addition to any other taxes to which it may be liable under the first and twenty-first sections of this act, a tax of eight mills on the dollar upon the gross amount of said premiums and assessments received from business transacted within this Commonwealth * * *. And provided, further, that hereafter the annual tax upon premiums of insurance companies of other States or foreign governments, shall be at the rate of two per centum upon the gross premiums of every character and description received from business done within this Commonwealth within the entire calendar year preceding."

In the State courts the defendant's contention was twofold: (*a*) That the Act, properly construed, was not applicable to Federal business done within the *territorial limits* but (because done under the Act of Congress) not within the taxing *jurisdiction* of the State of Pennsylvania; (*b*) That the Act, if applicable to such Federal business, is contrary to the Constitution of the United States. The former of these two propositions is, of course, foreclosed in this court by the adverse decision of the State courts on the construction of the Pennsylvania statute. The constitutional question becomes the sole question open in this Court.

Assignments of Error.

The assignments of error (set out in full at pages 31 to 35 of the Record) present various aspects of the one fundamental error here relied on, viz, the action of the Supreme Court of Pennsylvania in holding constitutional the Pennsylvania Act of June 28, 1895, as applicable to and imposing a tax on business done under the Act of Congress.

ARGUMENT.

The State of Pennsylvania Cannot, Consistently with the Constitution of the United States, Subject a Maryland Surety Company to a Tax, at the Rate of Two Per Cent. of its Gross Premiums Received Therefrom, on the Occupation or Privilege of Carrying on Business Under the Act of Congress, viz, Executing Bonds to the United States Government Required by the Laws of the United States.

I.

(*a*) THIS TAX IS AN OCCUPATION OR PRIVILEGE TAX ON THE PRIVILEGE OF CARRYING ON BUSINESS UNDER THE ACT OF CONGRESS; IT IS NOT A PROPERTY TAX ON PROPERTY (TANGIBLE OR INTANGIBLE) OF THE DEFENDANT;

(*b*) NOR IS IT, EITHER IN NAME OR IN FACT, A "COMMUTATION TAX" OR "JUST EQUIVALENT FOR THE ORDINARY TAX UPON PROPERTY, ASCERTAINED BY REFERENCE THERETO."

(*a*) In *Equitable Life Society vs. Pennsylvania*, 238 U. S. 143, this Court said (with respect to the same provision of the Pennsylvania statute which is here involved), "this is held to be a tax for the privilege of doing business in the State" (page 145), and "the Supreme Court of Pennsylvania speaks of it as a tax for the privilege of doing business within the Commonwealth" (page 146), adding that "whether the statement is a construction of the act or not" (page 146), this Court would, at least so far as necessary to sustain the tax, assume that to be the proper construction.

Unquestionably, in the present case the Pennsylvania courts have definitely so *construed* the Act. "The tax which is now claimed is an exaction for the privilege of doing business in the State. * * * The tax, as we have said, is a charge for the privilege of transacting business in the State, measured by the amount of the business done." (Opinion; Record, pages 15, 16.)

The Supreme Court of Pennsylvania has always so held. This tax on foreign insurance companies, reduced from three per cent. to two per cent. in 1889 [Act of June 1, 1889, P. L. 420, Sec. 24], has been in force continuously since 1856 [Act of April 9, 1856, P. L. 284, Sec. 4], though the various Acts from time to time imposing the tax have undergone a long series of changes (as to verbiage, procedure, scope of companies embraced, or other details not affecting the nature or amount of the tax), through successive supplements, amendments, and repeals and re-enactments. [Acts of May 12, 1857, P. L. 458; May 1, 1861, P. L. 604, Sec. 1; April 11, 1862, P. L. 428; August 25, 1864, P. L. 988, Sec. 2; March 27, 1865, P. L. 53; March 1, 1866, P. L. 83, Sec. 1; March 28, 1867, P. L. 49; April 11, 1868, P. L. 83, Sec. 7; April 4, 1873, P. L. 20, Secs. 10, 18; June 1, 1889, P. L. 420, Sec. 24; June 28, 1895, P. L. 408, Sec. 1.] In *Commonwealth vs. Standard Oil Co.* (1882), 101 Pa. St. 119, 145 [cited by this Court in *Delaware, L., etc., R. R. Co. vs. Pennsylvania,* 198 U. S. 341, 353], the Supreme Court of Pennsylvania held that the Pennsylvania tax on the value of the capital stock of corporations, domestic or foreign, other than foreign insurance companies [under successive Acts of 1868, 1874, 1877 and 1879 there cited, which, except in minor details, were the same as Sections 4 and 5 of the Act of June 8th, 1891 (P. L. 229), set out in full in 198 U. S. at pages 342 to 344], is a tax on the *property* and assets of the corporation issuing such stock, and expressly distinguished this tax on the capital stock of other corporations

from the tax on gross premiums of foreign insurance companies, holding the latter to be "a franchise or license tax upon foreign corporations for the privilege of doing business within this State."

The Pennsylvania courts could not properly have held otherwise. Even if the legislature or the courts of Pennsylvania had held this to be a tax on the property and not a tax on the business of the defendant, the name thus given the tax could not have prevented this Court from finding it to be, in its real nature and effect, a tax upon the business. This Court has very recently held that where "the manifest purpose" of a gross revenue tax equal to a specified percentage on gross receipts from production of a mine in addition to taxes levied and collected upon an *ad valorem* basis, is "to reach all sales and secure a certain percentage thereof—a method commonly pursued in respect of license and occupation taxes" the tax is, in effect, a privilege or occupation tax, and, if imposed on a *business* exempted from taxation by the Constitution of the United States, is invalid. *Choctaw & Gulf R. R. vs. Harrison,* 235 U. S. 292, 299.

In the present case the express language of the Act states "the manifest purpose to reach all premiums and secure a certain percentage thereof." As between proceeds of *sales* of goods and insurance *premiums,* the latter bear (if any) a much more remote relation than the former to the property (or the value thereof) of the company receiving them.

(*b*) As the Pennsylvania courts have always held this tax to be a privilege or occupation tax, and the Attorney-General of Pennsylvania, in *Equitable Life Society vs. Pennsylvania,* 238 U. S. 143, argued vigorously that it is *"a tax on business, not on property,"* it is probably superfluous for us further to urge the same proposition. Lest it might, however, by any possibility be suggested in this Court that this tax could be sustained on grounds not suggested in argument below or in

the opinion in this or any other Pennsylvania case, we take the liberty of pointing out that this tax is neither a tax on property nor an equivalent therefor sustainable as such under the decisions of this Court.

It is established, by repeated decisions of this Court, that a tax upon gross receipts, when such receipts are derived from a business protected by the Constitution of the United States, is a tax upon such business and is, therefore, unconstitutional. This is equally true, whether such business be interstate commerce [*Philadelphia & Southern Mail Steamship Co. vs. Pennsylvania,* 122 U. S. 326; *Western Union Tel. Co. vs. Pennsylvania,* 128 U. S. 39; *Galveston, Harrisburg, etc., Ry. Co. vs. Texas,* 210 U. S. 217, 224-225, and cases there cited; *Oklahoma vs. Wells, Fargo & Co.,* 223 U. S. 298] or Federal governmental business [*Western Union Tel. Co. vs. Texas,* 105 U. S. 460; *Choctaw & Gulf R. R. vs. Harrison,* 235 U. S. 292].

The only qualification of this rule, and the only circumstances under which a tax based on gross receipts from a Federal business can be sustained—as a "commutation tax" [210 U. S. 226]—are stated, in *Postal Telagraph Cable Co. vs. Adams,* 155 U. S. 688, 695-697 (italics ours):

> "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, *if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum*

which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

* * * * * * *

"Doubtless no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce, but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, *if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto,* it is not open to attack as inconsistent with the Constitution."

(Quoted and followed in *U. S. Express Co. vs. Minnesota,* 223 U. S. 335, 345, 347-348. Compare *Maine vs. Grand Trunk Ry. Co.,* 142 U. S. 217, as explained in *Galveston, Harrisburg, etc., Ry. Co. vs. Texas,* 210 U. S. 217, 226; *Baltic Mining Co. vs. Massachusetts,* 231 U. S. 68, 83.)

For a number of reasons, it is impossible to sustain the tax in this case as such a "commutation tax." Fundamentally, that kind of a "commutation tax" is inapplicable to surety companies or other insurance companies,—certainly to those which do business in more than one State. The property of an insurance company normally consists of investments in stocks and bonds, home office real estate, cash in bank and uncollected premiums or agents' balances,—principally *investments.* The value of *such* property does not "result from the use to which it is put," or "vary with the profitableness of that use." [155 U. S. 697.] The *business* of such a company may, of course, give an *independent* value to its *"good will,"* but the general *property* of the company can hardly be said to have any "additional value gained by being part of a going concern" [210 U. S. 226], or "due to

* * * the organic relation of the property in [one] State to the whole system." (*Fargo vs. Hart,* 193 U. S. 490, 499.) There is no such *geographical unity* as exists with respect to the property of a railroad or express company or a telegraph company, making every part indispensable to the whole and generally creating elements of natural monopoly. There is little or no discernible relation between *gross premiums* and the *value of the property* (*i. e.,* principally the *investments*) of an insurance company. There is absolutely none between premiums and property in any *one State,* considered apart from the business and property of the Company as a whole. The entire *property* of an insurance company, with comparatively trivial exceptions, normally has its situs at the home office, in the state of incorporation, and in no other State. The *business* of such a company, but not its property, frequently (as in the case of the Fidelity and Deposit Company of Maryland) is found in every part of the world.

In other words, the *exceptional* situation, with respect to *express* companies, which will render unconstitutional an attempted commutation tax based on gross receipts (*Fargo vs. Hart,* 193 U. S. 490; *Oklahoma vs. Wells, Fargo & Co.,* 223 U. S. 298, 300, 301), is the *normal* situation with respect to *insurance* companies.

Evidently because the *business* of a foreign insurance company is generally substantial in amount, while its *property* within the State is negligible, practically every State (*e. g.,* forty-five out of the forty-six in which the Equitable Life Society does business [239 Pa. St. 290] *taxes* the *business* of such companies by a tax on premiums, either *in addition* to *ordinary property taxation,* or *in lieu thereof,* but *not* as "a just *equivalent therefor, ascertained by reference thereto.*" On the contrary, where the tax on premiums is made a *substitute* for ordinary property taxation, this is done for the very reason that the tax on the business is *not equivalent,* but is much *greater* than a tax on property. The right of

the States to impose the more productive tax on business, instead of a less productive—practically illusory—tax on property, is (so long as no *Federal business* is taxed), of course, unquestioned.

In Pennsylvania, this gross premium tax on the business of foreign insurance companies is, *nominally,* partly in addition to, partly in lieu of, property taxation. *Practically, all* ordinary property taxation in Pennsylvania (on the basis applicable to corporations generally, domestic or foreign, other than foreign insurance companies)—both that which is and that which is not *nominally* applicable to foreign insurance companies — would, if applied to foreign insurance companies, be negligible. In other words, Pennsylvania imposes a *substantial* tax on the *business* of foreign insurance companies, in *lieu of* a *property* tax on their capital stock (*i. e.,* assets, including investments in bonds and stocks) which, applied to foreign insurance companies, would be illusory, and in *addition* to a property tax on investments which is also illusory. This will be evident from a statement of the relevant provisions of the statutes now in force governing the taxation of the property and business of corporations. A brief outline of the source and history of these provisions will also show that the State of Pennsylvania has, from time to time, repeatedly imposed taxes on the *occupations* of individuals or the *business* of corporations, sometimes in addition to, sometimes (because *more* productive) in lieu of, property taxation, but *never* as an *equivalent* therefor.

History of Statutes Now in Force Taxing Property and Business of Corporations.

(A) Long before it adopted its present system of taxing, for State purposes, the *business* of foreign insurance companies [1856] and various other corporations, foreign or domestic [1866], by a tax on *gross receipts,* and before it

adopted its present system of taxing, for State purposes, the *property* of corporations [1840], by a tax on their *capital stock* (*i. e.*, their assets), the State of Pennsylvania taxed *both property* and *occupations*, under the same statute, for local purposes, and has always continued to do so. Section 4 of the Act of April 15, 1834 (P. L. 512) [still in force—Stewart's Purdon's Digest of Pennsylvania Laws (13th Edition), pages 4617-4620], provides that assessors shall take

> "an account of the following real and personal property:
> I. Real estate, viz.: * * *
> II. The following personal estate, viz.: All horses, mares, geldings and cattle * * *.
> III. *All offices and posts of profit, professions, trades and occupations and all single freemen above the age of twenty-one years, who shall not follow any occupation or callings.*"

Section 5 [Purdon's Digest, page 4628] provides that the assessors shall "value the property of which an account shall be so taken" and shall "rate *all offices and posts of profit, professions, trades and occupations*, at their discretion, having due regard to the profits arising therefrom."

Under this Act a captain of a United States revenue cutter was taxed for his office. This Court held the tax unconstitutional, because it is beyond the power of a State to tax an office created by the United States.

Dobbins vs. Erie County, 16 Peters, 435 (1842).

Half a century later it was again attempted, under this same Act of 1834, to tax the office of a postal clerk, but the State court struck down the tax on the authority of the *Dobbins* case.

Ulsh vs. Perry County, 7 Pa. Dist. Reports, 488 (1898).

An Act of March 25, 1831 (P. L. 206), imposing a State tax, having been repealed by an Act of February 18, 1836 (P. L. 36), a State tax was again imposed by the Act of June 11, 1840 (P. L. 612), and has (with many changes, from time to time) been maintained ever since. Section 1 of this Act of 1840, which imposed, on "the capital stock" of all *Pennsylvania* corporations "on which a dividend or profit of one per cent. per annum is made or declared" an annual *State* tax "of one-half mill on every dollar of the [par] value thereof, and an additional half mill * * * for every additional one per cent. * * * of dividend or profit * * * [*i. e.*, three mills on a value calculated by capitalizing earnings at the rate of six per cent.]," was the beginning of the State tax on capital stock, which, repeatedly since changed (particularly by the addition of procedural details), remains unchanged in its nature and general characteristics. [*Cf.* Secs. 4 and 5 of Act of June 8, 1891, P. L. 229 (amended, in details wholly immaterial in this case, by Act of June 8, 1893, P. L. 353), set out in 198 U. S., at pages 342 to 344.]

Section 2 of the Act of 1840 imposed an annual *State tax*

> *"upon all real and personal property, persons, trades, occupations and professions* now * * * taxable" for county purposes, of "one mill upon every dollar of the actual value thereof"; on "all mortgages, moneys at interest, debts due * * * whether by * * * note, * * * bond, judgment, * * * all * * * shares * * * owned * * * by *individuals*" in Pennsylvania in any *foreign* corporation, etc., "one-half mill on every dollar of the value thereof, on which one per cent. per annum dividend or profit may accrue * * *, and an additional half-mill * * * for every additional one per cent. * * * of any interest, dividend or profit accruing * * *"; upon "household furniture," "pleasure carriages," and "watches" special rates respectively stated: "upon *all salaries and emoluments of office,*" created by any law of Pennsylvania, *"one per cent. upon every dollar of the value thereof."*

Section 32 of an Act of April 29, 1844, P. L. 486 [still in force, with respect to *county* taxes, as limited by subsequent ts—*Purdon's Digest,* pages 4620-4628], provides that:

"* * * all real estate, to wit: * * * [by sec. 4, Act of February 23, 1866, P. L. 83—*Purdon's Digest,* page 4660—real estate is exempt from *state* taxation]; also all personal estate, to wit: horses, mares, geldings, mules and neat cattle * * * [by Sec. 1, Act of March 21, 1873, P. L. 46—*Purdon's Digest,* page 4661—horses, etc., are exempt from state taxation], also all mortgages, money owing * * *, whether by * * * note, * * * bond or judgment [by Sec. 1, Act of April 4, 1868, P. L. 61—*Purdon's Digest,* pages 4659-4600—mortgages and judgments are exempt from local taxation]; * * * also all *shares of stock* in any" corporation, domestic or foreign; [by Sec. 1, Act of January 3, 1868, P. L. 1318—*Purdon's Digest,* page 4659—*shares* of stock of *Pennsylvania* corporations which pay capital stock tax are exempt from all *state* or *local* taxation]; "also all household furniture, * * * pleasure carriages, * * * [Sec. 1, Act of May 13, 1887, P. L. 114,—*Purdon's Digest,* page 4540—repealed all taxes on household furniture and pleasure carriages]; *salaries and emoluments of office, all offices, and posts of profit, professions, trades and occupations, except the occupation of farmers,* together with all other things taxable by the laws of" Pennsylvania, "shall be valued and assessed and subject to taxation for the purposes in this act mentioned, and *for all state and county purposes whatsoever.*" [Superseded, as to *state* taxation, by subsequent Acts.]

Section 34 of the Act of 1844 imposed an annual *State* tax on "pleasure carriages," and "watches" at special rates respectively stated; "upon *all salaries, emoluments of office,* * * * *held under* * * * *the laws of" Pennsylvania or under any Pennsylvania corporation, "two per cent.* * * * *of the value thereof above $200;* upon *trades, occupations and professions, one per cent.* * * * *of the value thereof above $200;* and upon *all other property* * * * *taxable for state purposes* * * * *three mills* on every dollar of the value thereof"; and *repealed all prior laws levying state taxes.*

Section 33 of the Act of 1844 continued the tax on the capital stock of Pennsylvania corporations which paid dividends of *not less than six per cent.*, at one-half mill for each one per cent. of dividend (*i. e.*, not less than three mills on *par* value) and, with respect to those paying less than six per cent., made the tax three mills on a sworn *valuation* of the capital stock.

An Act of April 22, 1846 (P. L. 486), which (Sec. 1) imposed the State tax of three mills on property held in trust by persons or corporations, and (Sec. 3) required certain statements to be furnished to assessors by persons and corporations, was construed as making Sections 32 and 34 of the Act of 1844 applicable (if not originally so applicable) to the *property* of *corporations* as well as that of individuals. The property of Pennsylvania corporations was thus (under Sec. 34 of the Act of 1844), virtually subject to *double* taxation, for both *State* and *county* purposes (viz, a tax on the *property*, as such, and a tax on the *shares* in the hands of Pennsylvania holders), and, for *State* purposes, to *triple* taxation, through the additional tax (Sec. 33) on *capital stock* (*i. e.*, assets). [*Saving Fund vs. Yard*, 9 Pa. St. 359; *Insurance Co. vs. County*, 9 Pa. St. 413; *Easton Bridge Co. vs. County*, 9 Pa. St. 415; *Carbon Iron Co. vs. Carbon County*, 39 Pa. St. 251; *Lycoming County vs. Gamble*, 47 Pa. St. 106; *Whitesell vs. County of Northampton*, 49 Pa. St. 526.] The situation of foreign corporations was, except that they were not (until 1868) subject to the tax on *capital stock*, the same, in so far as their shares were held in Pennsylvania.

Section 4 of the Act of 1834 and section 32 of the Act of 1844 (with the subsequent limitations above noted) constitute the system of *county* taxation, for individuals and corporations, still in force. In a word, all taxable *property*, real or personal, having its situs in any county, is taxed against the owner, whether an individual or a corporation,

domestic or foreign (*shares* of stock of *Pennsylvania* corporations which pay the *state* tax on capital stock not being taxable for state or *local* purposes). If a foreign insurance company owned any taxable property in Pennsylvania, it would be so taxed. Neither the tax on capital stock nor any of the special taxes from time to time imposed on various corporations for *state* purposes have ever been introduced into local taxation (though proceeds of state taxes are frequently distributed among local authorities). We have, therefore, mentioned *county* taxation, only to point out that it no longer is (as it originally was) dealt with in the same statutes which deal with state taxation, and that it has no bearing whatever upon the *state* tax statute involved in this case,—except to illustrate that, even with respect to individuals, the State of Pennsylvania has, for almost a century, continuously taxed *occupations, in addition to property.*

(B) The present system of taxing the *business* of various corporations by a tax on gross receipts began in 1856 (Act of April 9, 1856, P. L. 284). This Act (sec. 4) imposed upon various classes of *foreign insurance companies* a flat charge, varying from $100 to $200 for different counties, for a license to do business in *each county* in Pennsylvania for *one year,* and for each *renewal,* and also an *annual tax of three per cent. of gross premiums.* The Act said nothing about *property* taxation, and did not exempt foreign insurance companies from taxation [under Section 34 of the Act of 1844] on *property* (if they had any) in Pennsylvania. Later [Act of March 27, 1865, P. L. 53], after a number of intervening amendatory acts [*supra,* p. 7] now unimportant, the flat charge was changed to $600 for the entire State.

Prior acts were repealed by an Act of April 11, 1868, (P. L. 83), "to revise, amend and consolidate the several laws regulating the licensing of foreign insurance companies."

This Act required (sec. 6) various foreign insurance companies, before receiving a license, to

> "pay to the Treasurer of the State, for the use of the Commonwealth, the sum of five hundred dollars for the privilege of transacting business in this State for the full term of one year, and in the same proportion for any less period, * * *;"

and also required (Sec. 7)

> "the agent of every insurance company * * * licensed under * * * this act" to "retain * * * out of the money received by him for premiums * * * a sum equal to a tax of three per centum upon the entire amount of said premiums * * * received by him as agent aforesaid * * *; which said sum shall be paid to the treasurer of the commonwealth at the time of the expiration of the license of said agent; and the auditor-general shall not have the power to grant a renewal of the license of such company * * * until the tax aforesaid is paid into the hands of the State Treasurer for the use of the Commonwealth; * * *"

That is to say, a flat charge is made only for the first year or fraction of a year, till the first gross premium tax is payable; thereafter this *tax* is the *only recurrent charge* for continuing to do business in Pennsylvania.

The Act of 1868 was repealed by an Act of April 4, 1873 (P. L. 20), (sec. 18), which (except certain small filing fees intended to defray expenses,—Secs. 6 and 7), imposed no flat charge for licenses, but re-enacted (Sec. 10), with formal changes now immaterial, the tax imposed by Section 7 of the Act of 1868. The only change in this tax since 1873 was effected by the proviso in Section 24 of the Act of June 1, 1889 (P. L. 420), reducing the tax from three per cent. to two per cent. This proviso was re-enacted, without change, in Section 1 of the Act of June 28, 1895 (P. L. 408) [*supra*], under which the Commonwealth makes its claim in this case.

The taxation of *business* in addition to *property* taxation was (evidently to meet war needs) greatly extended by an Act of April 30, 1864 (P. L. 218), which imposed (Section 1) a tax on tonnage upon railroad and other transportation companies [held unconstitutional as to interstate commerce, *State Freight Tax,* 15 Wall. 232, 271], and (Sec. 2) a tax of three per cent. on the *net* earnings or income of private bankers and brokers, certain named corporations, including *insurance companies* and *foreign insurance companies,* and *all other corporations doing business in Pennsylvania* except those subject to the tonnage tax (with another exception not now material), with a proviso that companies paying this tax should be exempt from the three per cent. tax on foreign insurance companies. Evidently it was immediately discovered that this tax on *net* earnings, though increasing taxation of other corporations, including Pennsylvania insurance companies, would decrease the burden upon foreign insurance companies. This Act was, therefore, so far as applicable to foreign insurance companies, repealed immediately [Act of May 4, 1864, P. L. 265].

In 1866 [Act of February 23, 1866, P. L. 82, Sec. 2] railroad and transportation companies already subject to the tax on tonnage but not to the tax on net income under the Act of 1864, were subjected to a tax of three-fourths of one per cent. on *gross receipts,* in addition to their other taxes. [Held constitutional as to interstate commerce in *State Tax on Railway Gross Receipts,* 15 Wall. 284, 292; practically overruled in *Philadelphia & Southern Mail Steamship Co. vs. Pennsylvania,* 122 U. S. 326].

The Act of May 1, 1868 (P. L. 108), repealed (sec. 16) and re-enacted prior acts taxing the capital stock [Section 1, Act of 1840; Section 33, Act of 1844; Act of April 12, 1859] and also those taxing the business [Sections 1 and 2, Act of April 30, 1864; Section 2, Act of 1866] of corporations, except the Act [of April 11, 1868] relating to foreign

insurance companies, which was not affected in any way. The tonnage tax (sec. 7), the three-fourths of one per cent. gross receipts tax (Sec. 8), and the three per cent. net income tax (sec. 6) were re-enacted substantially as they were in the Acts of 1864 and 1866. The tax on capital stock (sec. 4), previously applicable only to Pennsylvania corporations, was now extended to *all corporations doing business in Pennsylvania, except* banks and *foreign insurance companies.* [An Act of April 12, 1859, P. L. 529, had made the rate of tax one-half mill for each one per cent. of dividends of corporations paying *any* dividend and three mills on the sworn valuation of the stock of companies paying no dividend. This rate was continued in the Act of 1868.]

This exception of foreign insurance companies from the operation of the State tax on capital stock is the only instance of a property tax, State or local, applicable to other corporations, to which foreign insurance companies are not subject. The reasons for making this exception evidently were, first, that the tax on the capital stock of foreign insurance companies [*i. e.*, on that part, if any, of the assets constituting such capital stock, which is situated within the State of Pennsylvania, *Commonwealth vs. Standard Oil Co.*, 101 Pa. St. 119; *Delaware, L., etc., R. R. Co. vs. Pennsylvania*, 198 U. S. 341, 353], would be negligible in amount; and second, that the business of foreign insurance companies was already subject to a tax *not equivalent* to, but *much greater* in amount than any property tax would be.

An Act of March 21st, 1873 (P. L. 46), repealed (Sec. 2) the *net* income tax (Sec. 6, Act of 1868) as to companies subject to the tax on capital stock, *i. e.*, as to practically all corporations, so that this net income tax though still in force [Sec. 10, Act of June 7, 1879, P. L. 112; Sec. 27, Act of June 1, 1889, P. L. 420] now applies to but few, if any, corporations.

An Act of March 24, 1874 (P. L. 68), repealed (Sec. 11) the tonnage tax and the gross receipts tax on railroad and transportation companies (Secs. 7 and 8, Act of May 1, 1868), and increased the rate of tax on the capital stock of these companies to nine-tenths of a mill for each one per cent. of dividends, and six mills on valuation in case of companies not paying any dividends (Sec. 4), leaving the rate as to other corporations unchanged (Sec. 5). This special rate of taxation on the capital stock of transportation companies was, however, by the Act of March 20, 1877 (P. L. 6), repealed (Sec. 8), and replaced (Sec. 5) by a tax on gross receipts, at the rate of eight mills on the dollar, applicable not only to railroad and transportation companies but to telegraph companies, express companies, and a number of other kinds of corporations *doing business in Pennsylvania* (*i. e.*, domestic or foreign) [held unconstitutional as to interstate commerce, *Philadelphia & Southern Mail Steamship Co. vs. Pennsylvania*, 122 U. S. 326]. Section 6 of the Act of 1877 imposed a tax on the gross receipts of Pennsylvania insurance companies at the same rate of eight mills. This tax on gross receipts of *Pennsylvania* insurance companies, several times repealed and re-enacted [Sec. 8, Act of June 7, 1879, P. L. 112; Sec. 24, Act of June 1, 1889, P. L. 420; Sec. 1, Act of June 28, 1895, P. L. 408, *supra*,] is now imposed by the same section the proviso in which fixes the present tax on gross receipts of *foreign insurance* companies, upon which the claim in this case is based. It is, in the present Act (as in the Act of 1889) expressly stated to be "in addition to any other taxes to which it [every Pennsylvania insurance company] may be liable under the first and twenty-first sections of this Act" [referring to the Act of 1889,—Sec. 1 imposing the general State tax on certain personal property of individuals and corporations not subject to the capital stock tax, and Sec. 21 imposing the capital stock tax on corporations, domestic and foreign]. The similar

eight mills tax on gross receipts of domestic and foreign railroad companies, and other specifically enumerated corporations [Sec. 5, Act of 1877; since repealed and re-enacted, Sec. 7, Act of June 7, 1879, P. L. 112, (held unconstitutional as to interstate commerce, *Philadelphia & Southern Mail Steamship Co. vs. Pennsylvania,* 122 U. S. 326; *Western Union Tel. Co. vs. Pennsylvania,* 128 U. S. 39); Sec. 23, Act of June 1, 1889, P. L. 420], is still in force.

Sec. 16 of the Act of June 7, 1879 (P. L. 112) [since repealed (Sec. 1, Act of April 24, 1885, P. L. 9)], is another illustration of the same policy, pursued by the State of Pennsylvania with respect to foreign insurance companies, of imposing an *occupation* or *privilege* tax on foreign corporations (as a *substitute* but *not* an *equivalent* for a property tax) for the very reason that a property tax would be unproductive. This section [quoted in full, 125 U. S. 182, 136 U. S. 115] required every "foreign corporation, except foreign insurance companies, *which does not invest and use its capital in this commonwealth*" to pay for a "license" to maintain an office in Pennsylvania one-fourth of a mill on each dollar of capital stock which said Company is *authorized* to have [*i. e.,* not on *actual* capital stock consisting of *property* in Pennsylvania], "provided, however, that no license fee shall be necessary for any corporation paying a tax under any previous section of this Act. * * * " [Held constitutional, *Pembina Mining Co. vs. Pennsylvania,* 125 U. S. 181; but, as to a corporation whose business is interstate commerce, unconstitutional. *Norfolk & Western R. R. Co. vs. Pennsylvania,* 136 U. S. 114.]

(C) The two State property taxes imposed by the Act of 1844, on property *eo nomine* (Sections 32 and 34) and on capital stock, *i. e.,* property of corporations (Sec. 33) respectively, are still in force (Sections 1 and 5 respectively of Act of June 8, 1891, P. L. 229), the essential nature and

character of these taxes being unchanged. One of the changes effected through successive amendments has been the elimination of double taxation by overlapping of the two taxes so as to cover the same property of corporations.

We have already noted (*supra*, pp. 20-21) changes in the tax on capital stock up to 1877 [Acts of 1859, 1868, 1874, 1877], principally the extension of this tax to foreign corporations other than foreign insurance companies [Act of 1868]. Meanwhile, between 1846 and 1879, the State tax on property (Sections 32 and 34 of the Act of 1844) [reduced from three mills to two and one-half mills by Section 86, Act of May 18, 1857, P. L. 559, 571], had [by successive exemptions, noted above in connection with Section 32, Act of 1844, of real estate and certain personal property from State taxation] become narrowed in scope to a tax on mortgages, bonds and securities and shares of stock of domestic and foreign corporations.

The Act of June 7, 1879, P. L. 112, which repealed (Section 18) all "inconsistent" or "substantially re-enacted" prior laws, in this way replaced both the tax on *property* and the tax on *capital stock* under the Act of 1844 (and the subsequent Acts hereinbefore noted). Section 4 of the Act of 1879 merely amplified (as to details here unimportant) the capital stock tax as re-enacted by the Act of 1877. Section 17 of the Act of 1879 supplanted Sections 32 (as to State tax) and 34 of the Act of 1844, and imposed a State tax of *four* mills on certain enumerated personal property, viz, mortgages, bonds, securities and "moneyed capital" (but not shares of stock, except a special tax on shares of bank stock) *in the hands of individuals*. Two instances of double taxation under the Act of 1844 were thus terminated: (1) by limiting the tax on *property co nomine* to individuals, corporations were no longer liable to taxes on the same property, as *property* and as *capital stock;* (2) by omitting *shares* of stock from taxation in the hands of individuals, no cor-

poration (domestic or foreign) remained liable to taxation on *both* its *property* and its *shares* of stock. [The Act of January 3, 1868 (P. L. 1318), had already exempted from taxation shares of stock of *Pennsylvania* corporations paying the tax on capital stock.]

Both Section 17 [as re-enacted, without any change here important, by Section 1 of Act of June 30, 1885, P. L. 193] and Section 4 of the Act of 1879, were repealed and re-enacted by Sections 1 and 21 respectively of the Act of June 1, 1889, P. L. 420. The rate of tax on property *eo nomine* (Section 1) was reduced from four mills to three mills; the rate on capital stock (Section 21) remained the same as since 1877, viz, one-half mill for each one per cent. of dividends, when six per cent. or over, three mills on valuation when no dividends or less than six per cent. are paid. The tax on property (Section 1) was again made applicable to corporations, domestic and foreign, as well as individuals, but a proviso in Section 21 excepted corporations paying the capital stock tax thereunder from further tax on "mortgages, bonds and other securities" [*i. e.*, from double taxation on the same property under *both* Sections 1 and 21. *Fidelity Co. vs. Loughlin*, 139 Pa. St. 612; *Commonwealth vs. Fall Brook Coal Co.*, 156 Pa. St. 488, 498]. The property tax (Section 1) was also again extended to cover shares of stock of domestic and foreign corporations, *except* companies subject to the capital stock tax under Section 21.

Both Sections 1 and 21 of the Act of 1889 were repealed and re-enacted, with amendments, by Sections 1 and 5 respectively of the Act of June 8, 1891 (P. L. 229). The only change made in Section 1 was to increase the rate of tax from *three* mills to *four* mills. The only changes in Section 21 were an increase of the rate of taxation from *three* mills to *five* mills (except as to fire and marine insurance companies) and the extension of this rate of tax on *valuation* to *all* corporations, regardless of payment or amount of divi-

dends. [Section 5 of the Act of 1891, re-enacting with amendments Section 21 of the Act of 1889, is set out in full in 198 U. S. p. 344. This section had again been repealed and re-enacted, with an amendment here wholly immaterial, by an Act of June 8, 1893 (P. L. 353). The Act of 1893, evidently ignored by this Court because immaterial in the case in 198 U. S., will for the same reason not be further noticed in this brief.]

Summary.

This unavoidably tedious review of the history of Pennsylvania taxes, on the property and business of various corporations, now in force may be summarized as follows:

1. The State of Pennsylvania has for many years (Acts of 1834 and 1844) been accustomed to taxing occupations, even of individuals, in addition to property.

2. Continuously since 1864 (not to mention earlier special taxes of other kinds now superseded or abandoned) the State of Pennsylvania has imposed a number of special *occupation* or *privilege* taxes on the *business* of various corporations, domestic or foreign. Most of these occupation or privilege taxes (including the present eight mills tax on gross receipts of foreign and domestic railroad companies and other named corporations and the present eight mills tax on gross premiums of Pennsylvania insurance companies) have been imposed in addition to ordinary property taxation. One at least (Section 16, Act of 1879) was imposed expressly upon the business of foreign corporations beyond the reach of ordinary property taxation. *None* have been imposed as an *equivalent* for ordinary *property taxation* or have (except the extra capital stock tax on transportation companies under the Act of 1874, repealed in 1877) been *ascertained* or measured with any *reference* whatever to the taxable *property* of the corporation taxed.

3. Three of these occupation or privilege taxes on the business of certain corporations have been held unconstitutional by this Court when applied to the Federal business of interstate commerce (*State Freight Tax*, 15 Wall. 232, 271; *Philadelphia & Southern Mail Steamship Co. vs. Pennsylvania*, 122 U. S. 326; *Western Union Tel. Co. vs. Pennsylvania*, 128 U. S. 39; *Norfolk & Western R. R. Co. vs. Penna.*, 136 U. S. 114); and an occupation tax on an individual in the employ of the Federal Government has been similarly stricken down (*Dobbins vs. Erie County*, 16 Peters, 435).

4. The business of foreign insurance companies is now subject to the occupation or privilege tax of two per cent. on gross premiums. The property of foreign insurance companies (if they had any in Pennsylva...) is *nominally exempt* from the tax on *capital stock* and *nominally subject* to the tax on *property* (*i. e.*, mortgages, bonds, securities, etc.). *Actually* foreign insurance companies have normally no property with its situs in Pennsylvania, which could be taxed either as *property eo nomine* or as constituting *capital stock*. The Pennsylvania tax on *capital stock* is a tax on "the *property* and *assets* of the corporation" [*Delaware L., etc., R. R. Co. vs. Pennsylvania*, 198 U. S. 341, 353, citing *Commonwealth vs. Standard Oil Co.*, 101 Pa. St. 119, 145, and *Commonwealth vs. Delaware, etc., R. R. Co.*, 165 Pa. St. 44], including both *tangible* and *intangible* property "the *franchises* as well as other property of the Company" [*Commonwealth vs. Delaware, etc., R. R. Co.*, 165 Pa. St. 44, 45], but not including any property having its situs outside of the State of Pennsylvania. [*Delaware L., etc., R. R. Co. vs. Pennsylvania*, 198 U. S. 341; *Commonwealth vs. Standard Oil Co.*, 101 Pa. St. 119.] The settled construction of Pennsylvania taxing statutes is that all such intangible personal property of a foreign corporation as investments in bonds or stocks—even stock in Pennsylvania corporations [*Common-*

wea'th vs. Standard Oil Co., 101 Pa. St. 119, 145], or deposit accounts with Pennsylvania banks used in the conduct of business in Pennsylvania, or securities physically kept in safe deposit vaults in Pennsylvania [*Commonwealth vs. Curtis Pub. Co.,* 237 Pa. St. 333, 335, 337]—has its situs at the domicile of the corporation and is, therefore, not taxable in Pennsylvania.

5. In this case the State of Pennsylvania claims a tax for the year 1909 amounting to $4,316.92 (of which $3,964 has been paid), *i. e.,* two per cent. on $215,846.05, gross premiums (including $17,646.86 from Federal business). (Record, pages 6, 9.) *This is the equivalent of a property tax,* at the present five mill rate of tax on capital stock, *on $863,384.20. It is not pretended that the defendant ever had any such amount of taxable property in Pennsylvania.* The Record does not show that it had any. As a matter of fact it did not.

[If this Court will take judicial notice of the official annual statement, for the year 1909, of the defendant, filed with the Insurance Commissioner of Pennsylvania as required by the laws of Pennsylvania, the substantial accuracy of which will certainly not be disputed by the Commonwealth, it will be found that the gross assets of the defendant on December 31st, 1909, were $6,291,105.98, comprising—

Real Estate in Maryland	$ 847,962.40
Investments in various bonds and stocks	4,550,400.00
Agents' balances Premiums in course of collection (home office)	289,389.06
Advance on contracts, secured	168.002.63
Cash in banks	435,351.89
Total	$6,291,105.98

None of these assets would be taxable in Pennsylvania. All are in fact taxed (through a tax on the *shares* of stock of the defendant) in the State of Maryland.

The capital stock and surplus on December 31, 1909 (after deducting liabilities), amounted to $4,566,915.40.

The tax on gross premiums claimed in this case would, therefore, be the equivalent of a property tax on $863,384.20, almost *fourteen* per cent. of the gross assets of the Company and almost *nineteen* per cent. of the book value of its capital stock, although *none* of the *property* of the defendant had its situs in Pennsylvania, and even business done in Pennsylvania, measured by gross premiums, was less than ten per cent. of $2,172,952.83, the amount of gross premiums on all business during the year 1909.]

II.

This Tax Cannot be Sustained as Within the Latitude Allowed a State in Fixing the **Measure** of a Tax on **Non-Federal** Business.

Possibly it may be (though it never has been) suggested that this tax might be sustained, on the principle applied in *Equitable Life Society vs. Pennsylvania,* 238 U. S. 143, as a *tax* on the defendant's *non-Federal* business, *measured* by its entire business, *Federal and non-Federal.* The facts in this case and the authorities would not support such a suggestion.

(*a*) The State courts have not construed this tax as a tax solely on *non-Federal* business. "The tax * * * is a charge for the privilege of transacting business in the State, measured by the amount of the business done" (Record, page 16). In other words, it is a tax on doing business, measured by the business *taxed;* not a tax on one business, measured by two businesses.

(*b*) However this tax be construed, a *tax* on *non-Federal* business, *"measured"* by *Federal and non-Federal* business, cannot be sustained. *Taxation* of a *Federal business,* under the guise of *measuring* a *lawful* tax, has always been stricken down by this Court. (*Western Union Tel. Co. vs. Kansas,* 216 U. S. 1; *Galveston, Harrisburg, etc., Ry. Co. vs. Texas,* 210 U. S. 217, 227; *Choctaw & Gulf R. R. vs. Harrison,* 235 U. S. 292.)

In *Equitable Life Society vs. Pennsylvania,* 238 U. S. 143, the tax was assailed only under the "due process" clause, which, in the Fifth Amendment, does not limit or restrict the taxing power at all (*Billings vs. United States,* 232 U. S. 261, 282), and, in the Fourteenth Amendment (apart from the "equal protection" clause), practically only reaffirms that inherent lack of extraterritorial power, on the part of a State (*Delaware L., etc., R. R. Co. vs. Pennsylvania,* 198 U. S. 341), which existed independent of the Fourteenth Amendment. (*Hays vs. Pacific Mail Steamship Co.,* 17 How. 596; *State Tax on Foreign-held Bonds,* 15 Wall. 300.) This Court pointed out the close practical relations between policy holders residing in Pennsylvania and business done in Pennsylvania, which made it "not unnatural to take the policy holders residing in the State as a measure without going into nicer if not impracticable details." The tax so measured was accordingly held to be within the "latitude allowed" as to "the mode of measuring the tax." (238 U. S. 147.)

Flint vs. Stone Tracy Co., 220 U. S. 108, 162-165, and the cases there cited, merely hold that "when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable." (220 U. S. 165.) That is to say, an exemption of *property* from *property taxation,*—taxation "on property

solely because of its ownership," does not exempt from taxation the *business* (or the *exercise* of the *privilege* of carrying it on), in which the owner of the non-taxable property is engaged. Conversely, the exemption of a Federal *business* from taxation does not exempt from ordinary property taxation the *property* of the person or corporation engaged in the non-taxable business. (*Williams vs. Talladega*, 226 U. S. 404.)

It has never been held that a tax on *taxable property* may be *measured* by *non-taxable property*, or that a tax on *taxable business* may be *measured* by *non-taxable business*. On the contrary, such taxes have always been stricken down as direct burdens on the non-taxable property or business, as the case may be. (*Western Union Tel. Co. vs. Kansas*, 216 U. S. 1, and cases *supra*.)

In this case our contention is, not that the State has gone beyond the latitude allowed it *under the Fourteenth Amendment*, but that, within *those* limits, it has collided, in the exercise of its taxing power, with the operations of the Federal Government. Under such circumstances, that which is not supreme must yield to that which is supreme.

III.

A Tax on the Occupation or Privilege of Carrying on Business Under the Act of Congress, viz., Executing Bonds to the United States Government Required by the Laws of the United States, is a Tax on a Federal Instrumentality Acting Under Congressional Authority in the Exercise of the Governmental Functions of the United States.

It is unnecessary to revert to the elaboration of reasons by Chief Justice Marshall in support of the principle

established in *McCulloch vs. Maryland*, 4 Wheat. 316. The principle, and authorities applying the principle, have recently been summarized by this Court (italics ours):

> "It was laid down by Mr. Chief Justice Marshall, speaking for this Court in *McCulloch vs. Maryland*, 4 Wheat. 316, 430, 436, that the State could not constitutionally impose taxation upon the operations of a local branch of the United States Bank, because the bank was an agency of the Federal Government, and the States had no power, by taxation or otherwise, to hamper the execution by that government of the powers conferred upon it by the people. The supremacy of the Federal Constitution and the laws made in pursuance thereof, and *the entire independence of the General Government from any control by the respective States*, were *the fundamental grounds of the decision*. The principle has never since been departed from, and has often been re-asserted and applied. *Osborn vs. U. S. Bank*, 9 Wheat. 738, 859; *Home Savings Bank vs. Des Moines*, 205 U. S. 503, 513; *Grether vs. Wright*, 75 Fed. Rep. 742, 753.
>
> "*State taxation of national bank shares*, as permitted by the act of Congress, without regard to the fact that a part or the whole of the capital of the bank is invested in national securities which are exempt from taxation (*Van Allen vs. Assessors*, 3 Wall. 573, 583; *Bradley vs. People*, 4 Wall. 459; *National Bank vs. Commonwealth*, 9 Wall. 353, 359), *is an apparent, not a real, exception. The same is true of taxes upon the mere property of agencies of the Federal Government.* (*Thompson vs. Pacific Railroad*, 9 Wall. 579, 589; *Railroad Co. vs. Peniston*, 18 Wall. 5, 32, 34). Indeed, these exceptions rest upon distinctions that were recognized in the decision of *McCulloch vs. Maryland*. Chief Justice Marshall said, in closing the discussion: 'This opinion * * * does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the

operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.' * * *

"The Supreme Court of Minnesota, conceding that the municipalities were Federal agencies in the performance of governmental functions, yet deemed that a material narrowing of the doctrine of *McCulloch vs. Maryland* was to be inferred from an expression contained in the opinion of this Court in *National Bank vs. Commonwealth*, 9 Wall. 353, 362, where it was said: 'The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal Government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government.' And from a like expression contained in the opinion in *Railroad Company vs. Peniston*, 18 Wall. 5, 36: 'It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers.'

"But we deem it entirely clear that *a tax upon the exercise of the function of issuing* municipal bonds *is a tax upon the operations of the government*, and not in any sense a tax upon the property of the municipality. And to tax the bonds as property in the hands of the holders is, in the last analysis, to impose a tax upon the right of the municipality to issue them. In *Weston vs. City Council of Charleston*, 2 Pet. 449, 466, 468, which involved the right of the city, acting under the authority of the State of South Carolina, to ordain a tax upon United States stock in the hands of the owner, Mr. Chief Justice Marshall, speaking for the Court, after reaffirm-

ing the principles settled in *McCulloch vs. Maryland*, said (p. 468): 'The American people have conferred the power of borrowing money on their government, and by making, that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised. *The right to tax the contract to any extent, when made, must operate upon the power* to borrow *before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely.*"

Farmers' Bank vs. Minnesota, 232 U. S. 516, 521-522, 525-526.

In *Flint vs. Stone Tracy Co.*, 220 U. S. 108, 155, this Court quoted, from the opinion by CHIEF JUSTICE CHASE, in *Veazie Bank vs. Fenno.*, 8 Wall. 533, 547 (italics ours):

> "It may be admitted that the reserved rights of the States, such as *the right to pass laws, to give effect to laws through executive action, to administer justice through the courts,* and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress."

In the same case this Court restated the same doctrine (italics ours):

> "The cases unite in exempting from Federal taxation the means and instrumentalities employed in carrying on the governmental operations of the State. The exercise of such rights as *the establishment of a judiciary, the employment of officers to administer and execute the laws and similar governmental functions* cannot be taxed by the Federal Government. *The Collector vs. Day*, 11 Wall. 113; *United States vs. Railroad Co.*, 17 Wall. 322; *Ambrosini vs. United States*, 187 U. S. 1."
>
> 220 U. S. 157-158.

In *Williams vs. Talladega,* 226 U. S. 404, it was held (reaffirming *Western Union Tel. Co. vs. Texas,* 105 U. S. 460) that a telegraph company which has accepted the terms of the Act of Congress of 1866 is an agency of the Federal Government for the transmission of messages sent on governmental business by officers of the United States, and that a State cannot tax the privilege of carrying on such governmental business.

> "Were it otherwise, an agency of the Federal Government, in the execution of its sovereign power, would be at the mercy of the taxing power of the State."
> 226 U. S. 419.

In *Choctaw and Gulf R. R. vs. Harrison,* 235 U. S. 292, it was held that a Federal instrumentality acting under Congressional authority cannot be subjected to an occupation or privilege tax by a State, and that, when the Federal government, by an agreement with an Indian tribe, assumes a definite duty in regard to operation of mines, lessees of the mines (under leases from trustees appointed pursuant to an Act of Congress) are such instrumentalities.

In the present case all the business of the defendant which the State of Pennsylvania here claims the right to tax is:

(*a*) business done under an Act of Congress,

(*b*) after the Attorney-General of the United States, proceeding under the Act, had granted the defendant authority in writing to do business under the Act;

(*c*) it consists wholly of executing bonds, running to the United States Government,

(*d*) required by the laws of the United States,

(*e*) exacted by the United States in the course of the performance of its governmental functions of

> (*i*) "giving effect to laws through executive action" [Internal Revenue, Customs, United States Govern-

ment contracts, Banks for United States deposits], and "the employment of officers to administer and execute the laws" [United States Governmental officials], and

(*ii*) "Administering justice through its courts" ["bonds given in Courts of the United States in litigation there pending"].

(Record, pages 14, 8-9).

ACT OF AUGUST 5, 1909.

During the very year for which a tax is claimed in this case, Congress materially extended Federal legislation governing the transaction of business by surety companies with the Federal Government, by legislating directly on the subject of premiums charged officers or employes of the United States for bonds required of them by law. An Act of August 5, 1909, c. 7 (36 Stat. 118, 125) provides:

> "Until otherwise provided by law, no bond shall be accepted from any surety or bonding company for any officer or employee of the United States which shall cost more than thirty-five per centum in excess of the rate of premium charged for a like bond during the calendar year nineteen hundred and eight: *Provided,* That hereafter the United States shall not pay any part of the premium or other cost of furnishing a bond required by law or otherwise of any officer or employee of the United States."

The same Act (Urgent Deficiency Appropriation Act) provided that a Joint Committee, consisting of three senators and three members of the House of Representatives, should

> "inquire into the rates of premium heretofore and now being charged as well as those proposed to be charged by surety or bonding companies for bonds of officers or employees of the United States and report to Congress by bill or otherwise at its next session what regulation, if any, should be exercised under law or otherwise over the same."

On February 27, 1911, the Commission thus created made its report to Congress (Senate Report No. 1260, 61st Congress, 3d Session). The Commission's somewhat radical recommendation, that a government "fidelity fund" be established (as an optional *alternative*, not a compulsory *substitute* for surety bonds), has never been adopted by Congress. The rate-regulating provision of the Act of 1909 still remains in force. Not only the legislation recommended, but also the other "suggested" measures mentioned in the report of the Commission (pages 5-9, 53-87), manifest a firm conviction that the Federal Government business of surety companies differs materially from their other business (pages 21, 57), and is a matter of great importance to the Federal Government. "Besides being objectionable as putting an unnecessary burden on the Government employee, *high rates weaken the protection given the Government.*" (Italics ours; pages 5, 50-53). "There seems to be no doubt that the enactment of this law [Act of August 13, 1894] met with general approval. * * * The report of the Judiciary Committee [House Report No. 248, 53d Congress, 2d Session] shows that *it was regarded as a good thing for* both employees and *the Government,* relieving the former from the embarrassment of asking friends to go on their bonds and *affording the latter a better security than did personal security.*" (Italics ours; page 18.) The Commission's report discloses no idea that the transaction of this Federal Government business by surety companies, or the cost of transacting it, is dependent upon the will or whim of any State (other than a State of incorporation). State supervision of the *companies* doing this *business* is referred to only as not safe to be relied upon by the Federal Government. "The practice [executive, not statutory] of relying on State examinations as to the solvency of companies should not be permitted." (Pages 6, 59.)

Our position is that, *quoad its Federal business,* (above described) involved in the present case, the defendant is,

even more clearly than a telegraph company or a lessee of Indians' mines, *an instrumentality or agency of the Federal Government* in the exercise of its governmental functions, and that the tax on this business is, therefore, unconstitutional. The Pennsylvania Courts having held otherwise, it is proper that we mention and discuss the reasons they assign for so holding.

Opinion of Pennsylvania Court.

The reasons assigned by the Pennsylvania Court for sustaining this tax are, in substance: (1) That the defendant was not, by the Act of Congress, authorized to do Federal business in Pennsylvania; (2) That the defendant is not, with respect to its Federal business, an instrumentality of the Federal government. We shall quote fully and discuss the reasoning of the Pennsylvania Courts on these two points, in the above order.

(A) As the Pennsylvania Courts rely principally upon their construction of the Act of Congress, we may first briefly review the provisions of this Act, which is entitled "An Act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereon." (Act of August 13, 1894, c. 282, 28 Stat. 279.)

Section 1 provides that "*whenever any* recognizance, stipulation, *bond* or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing anything * * * *is by the laws of the United States required* or permitted *to be given* with one surety or with two or more sureties, the execution of the same * * * shall be sufficient when executed * * * solely by *a corporation incorporated under the laws* of the United States, or *of any State* having *power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings*: Provided, that

such * * * bond * * * be *approved* by the *head of department, court, judge, officer, board, or body executive, legislative or judicial required to approve or accept* the same. But no officer or person having the approval of any bond shall exact that it be furnished by a guarantee company or by any particular guarantee company."

Section 2 provides that "*no such company shall do business under the provisions of this Act beyond the limits of the State* or Territory *under whose laws it was incorporated* and in which its principal office is located, nor beyond the limits of the District of Columbia, when such company was incorporated under its laws or the laws of the United States and its principal office is located in said District, *until it* shall by a written power of attorney *appoint* some *person residing within the jurisdiction of the court for the judicial district wherein such suretyship is to be undertaken,* * * * as its *agent* upon whom may be served all lawful *process* against such company * * * ." Duly authenticated copies of such power of attorney shall be filed with the clerk of the district court of the United States. In case of removal, resignation, death or incapacity of such agent, the company shall appoint another agent; meanwhile service of process may be upon the clerk of the court wherein suit is brought.

Section 3 requires "every company *before transacting any business under this Act*" to "deposit with the Attorney-General of the United States a *copy* of its *charter* * * * and a *statement* * * * sworn to * * * showing its *assets and liabilities.* If the * * * *Attorney-General* shall be *satisfied* that such company has *authority under its charter to do the business provided for in this Act,* and * * * a paid-up capital of not less than *two hundred and fifty thousand dollars* * * * and is *able to keep and perform its contracts,* he *shall grant authority in writing* to such company *to do business under this Act.*

Section 4 requires similar sworn *statements* showing assets and liabilities to be filed *quarterly* with the Attorney-General, who shall "*revoke* the *authority* of any such company *to transact any new business under this Act* whenever in his judgment such company is *not solvent* or is *conducting its business in violation of this Act.* He may institute inquiry at any time into the solvency of said company and may require * * * additional security * * * at any time * * * [from] any principal when he deems such company no longer sufficient security."

Section 5 provides that "any surety company *doing business under the provisions of this Act* may be *sued* in *respect thereof* in any *court of the United States* which has * * * jurisdiction of * * * suits upon such * * * bond * * in the district in which such * * * bond * * * was made * * * or in the district in which the principal office of such company is located. And *for the purposes of this Act* such * * * bond * * * shall be treated as made in the district in which the office is located * * * in which it is filed, or in the district in which the principal in such * * * bond * * * resided when it was made * * *."

Section 6 provides that "if any such company * * * neglect or refuse to pay any final judgment * * * against it upon any such * * * bond * * * it shall *forfeit* all *right to do business under this Act.*"

Section 7 provides that "any company which shall *execute* * * * any * * * bond * * * *under the provisions of this Act* shall be *estopped* in any proceeding to enforce the liability which it shall have assumed to incur, *to deny its corporate power* to execute * * * such instrument or assume such liability."

Section 8 provides that "any company *doing business under the provisions of this Act* which shall *fail to comply with any of its provisions* shall forfeit to the United States for

every such failure not less than five hundred dollars nor more than five thousand dollars" recoverable "by suit * * * in the same courts in which suit may be brought against such company *under the provisions of this Act* * * * ."

In a word, *the Act states all the terms and conditions upon which surety companies are authorized to do business within the jurisdiction of the Federal government.* It enumerates (Sec. 1) the business which is within Federal jurisdiction; prescribes (Sec. 3) *three* requisites—(1) *charter power,* (2) $250,000 *capital,* and (3) *ability to perform its contracts*—for every company seeking authority to do such business; makes (Sec. 2) an *additional requirement*—agent to accept service of process—as to *doing business beyond the State of incorporation;* requires (Sec. 4) continued solvency and obedience to the Act; fixes (Sec. 5) jurisdiction and venue of suits on bonds so executed, and (Sec. 7) limits defences in such suits; and prescribes (Secs. 4 and 6) forfeiture of right to do business under the Act, and (Sec. 8) penalties, for violation of the Act. Generally speaking, the Act covers substantially the ground commonly covered by State statutes with respect to business done by foreign surety companies *within the jurisdiction* of the enacting States. Indeed, its provisions are not unlike those of the Pennsylvania statute (Act of June 26th, 1895, P. L. 232), under which the defendant does *non-Federal* business in Pennsylvania.

The Pennsylvania Courts, however, hold that this Act of Congress does not authorize the defendant to do Federal business in Pennsylvania. On this point the opinion below says (italics ours):

> "We find nothing in the Act of Congress to support the proposition that the defendant was authorized by it to transact its business in the State of Pennsylvania. *The Act is silent as to the place where the contract of suretyship is to be entered into.* True, it is provided in Section 2 that no company shall do business under the

provisions of the Act beyond the limits of the State or territory under whose laws it was incorporated and in which its principal office is located, until it should appoint an agent or attorney within the jurisdiction of the Court for the judicial district wherein such suretyship is to be undertaken. But the manifest object of that provision was to secure and make convenient the service of legal process upon the company. It would be a strained interpretation of the section to hold that it authorized surety companies coming within its provisions to enter a state and therein transact business without the consent of the state or without complying with the conditions or terms which the state might prescribe. On the other hand, the inference is to be drawn from the provisions of Section 5 of the Act, which declares that wherever the obligation is made it is to be treated as made in the district to which it is returnable or in which it is filed or in which the principal resided, that *the federal government was not concerned about the place where the obligation was actually made.* The defendant company having transacted its business in this state by consent of the state, it must comply with the conditions which the state has laid down. *List vs. Com. of Pa.,* 118 Pa. 322; *Thorne vs. Travelers Ins. Co.,* 80 Pa. 28; *Paul vs. Virginia,* 8 Wall. 410; *Hooper vs. California,* 155 U. S. 652; *Pembina C. S. M. Co. vs.* Pa. 125 U. S. 181; *Horn S. M. Co. vs. N. Y.,* 143 U. S. 305. The tax which is now claimed is an exaction for the privilege of doing business in the state. *Germania Life Ins. Co. vs. Com.,* 85 Pa. 513.

"It is urged upon us that to require the defendant company to pay a tax for the privilege of doing the business in the state of becoming surety for federal officials and in federal matters is to interfere with the functions of the federal government. We are not able to see how the statute requiring the tax in question has that effect. *The defendant was free to enter into the contract of suretyship with respect to all the federal matters out of which the premiums, which are made the basis of the tax, were received. It could have done so in the place of its domicil. There is no requirement that the contracts*

of suretyship should be entered into at any particular place. Indeed, as we have heretofore said, Section 5 of the Act renders the place where the contract is made of no consequence. *The most natural place in which to make the contracts would be in the defendant's home state. In the absence of any legislation fixing the place the fair presumption would be that the corporation's domicil, or those states wherein permission should be given it to do business, was intended to be the place.* The defendant company, having preferred for its own convenience to make its contracts within the State of Pennsylvania in respect to the federal matters, rather than in its own state, may do so only on the terms which the State of Pennsylvania has fixed. It is not in a position, therefore, to complain that, because it may not transact what it calls federal business in the State of Pennsylvania without complying with the conditions prescribed by the state, the functions of the Federal Government are thus interfered with, when it may do that very business in the State of its domicil. * * *

"There is no obstacle in the way of the Federal Government accepting a corporate surety that has authority to act in the state in which it undertakes to contract, and *we are not inclined to believe that the government contemplated accepting a surety company which had no such authority. The surety company could only obtain the authority by complying with the laws of the state.*"

(Record, pages 15-16.)

This reasoning, we respectfully submit, is in the teeth of the language of the Act of Congress and is likewise opposed to all customary methods of construing Acts of Congress. The Act not only *does not limit* the "authority to do business under the Act" to business done at the "place of domicil" of the company doing such business; it *expressly states the conditions* upon which such a company may *"do business under the provisions of this Act beyond the limits of the State * * * under whose laws it was incorporated."* (Section 2.)

Reading such a limitation into the Act converts *authority to do business* into a *practical prohibition against doing business.* "The defendant's home state" would be *not* "the most natural place," but the *most unnatural* place "to make contracts of suretyship with respect to Federal matters" in Pennsylvania—or in Oregon. If the business of surety companies could be efficiently conducted as exclusively a "mail order business," the defendant would not pay the State of Pennsylvania a substantial annual tax for the privilege of conducting its *non-Federal* business. Applied to more distant States, the notion becomes only more absurd.

"The Federal Government was not concerned about the place where the obligation was actually made. * * * There is no requirement that the contracts of suretyship should be entered into at any particular place." Quite true. The purpose of the Act was to *authorize, not* to *prohibit,* the transaction of business under the Act. Such business may be done at whatever place, within the jurisdiction of the *United States,* the companies doing it, and their principals, find most convenient for the efficient conduct of the business.

We assume that the Pennsylvania court did not mean to question the *power* of Congress to "authorize surety companies to transact *Federal* business in Pennsylvania without the consent of the State and without complying with any conditions or terms which the State might prescribe." The right of the State to exclude foreign corporations, or to prescribe terms and conditions for their admission within its borders, does not include power to prohibit, or impose terms or conditions upon, the transaction by foreign corporations of *Federal* business within the State. (*Stockton vs. Baltimore & N. Y. R. Co.,* 32 Fed. 9, 14; *Pembina Mining Co. vs. Pennsylvania,* 125 U. S. 181, 186; *Horn Silver Mining Co. vs. New York,* 143 U. S. 305, 314-315; *Hooper vs. California,* 155 U. S. 648, 652; *Postal Tel. Cable Co. vs. Adams,* 155 U. S. 688, 696; *Western Union Tel. Co. vs. Kansas,*

216 U. S. 1, 27; *Pullman Co. vs. Kansas,* 216 U. S. 56, 68, 71.)

The *power* of Congress being conceded (as it must be), the *intention* is equally clear. There is not only the *express grant of authority, without limitation as to place,* to do business under the Act (sec. 3), but the *express statement* of the *conditions* upon which *business under the Act* may be *done beyond the limits of the State of incorporation* (sec. 2). The relations of the United States Government with surety companies are nation-wide in their scope. They require uniform regulation. The Act of Congress, in itself, is consistent, comprehensive, complete. Subordinated to the diverse laws of forty-eight States, it would be chaos. Had Congress intended such chaos, it would have said so. The only provision in the Act which has reference, directly or indirectly, to State laws is the requirement that companies doing business under the Act have *charter* power so to do. There is no reference whatever to the laws of any State other than a State of incorporation. In the exceptional cases when Congress intends to make the operation of an Act of Congress subject to the operation of State laws, the Act of Congress explicitly so provides. [*E. g.,* Federal Reserve Act (December 23, 1913), Section 8 (conversion of State banks into national banks); Section 11 (k), (right of national banks to act as trustee, etc.); National Bank Act, Rev. Stat., §§ 5154 (conversion of State banks), 5197 (usury), 5219 (State taxation); Bankruptcy Act, §6 (exemptions), §64, b (5) (debts, priority), §67, e, (liens, transfers).]

We know no precedent—none was cited in the State Courts—for reading an Act of Congress as subordinate to the laws of each of the forty-eight States. On the contrary, although this Court has held, with reference to the Act of 1866 concerning telegraph companies, "that the privilege given under the terms of the act to use the military and post roads of the United States for the poles and wires of the Company

is to be regarded as *permissive* in character and *not* as *creating corporate rights and privileges* to carry on the business of telegraphy" (*Williams vs. Talladega*, 226 U. S. 404, 416), yet this Court also held, in the same case, with reference to the same Act, that *"it made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a state to exclude them because they were foreign corporations,* or because of its wish to erect a monopoly of its own." (*S. C.*, 226 U. S. 415. quoting *Western Union Tel. Co. vs. Richmond*, 224 U. S. 160, 169.) (Italics ours.)

In the present case the Pennsylvania Courts have completely inverted sound rules of construction, (*a*) by refusing to construe the Pennsylvania Act, in subordination to the Act of Congress, as not applicable to Federal business, and (*b*) by construing the Act of Congress as subject and subordinate to the legislation of the several States. That which is supreme is held subject to that which is not supreme.

> "The conflict between the two authorities is direct and express. What the one declares may be done without the tax the other declares shall not be done except upon payment of the tax. In such an opposition, the only question is, which is the superior authority; and reduced to that, it furnishes its own answer."
>
> *Moran vs. New Orleans*, 112 U. S .69, 75.

(B) The Pennsylvania Courts also hold that the defendant is not, with respect to its Federal business, an instrumentality of the Federal Government. On this point they say (italics ours):

> "Nor can we understand how the defendant can be said to have been acting for the federal government at all either before or after the contracts of suretyship were entered into. *The contracts were entered into at the request of the principals, not at the request of the federal government. The federal government was not interested in having this defendant company rather than another engage to answer for the conduct or the*

acts of its officials. If the defendant had refused to act as surety, a domestic company or an individual surety or sureties would have answered. It might just as well be said that the individual sureties required before the Act of Congress was passed were acting for the federal government in matters of this kind. They were acting for themselves and their principals. They were selected by their principals and accepted by the federal government without cost or charge to it. So was this defendant company acting when it assumed the obligation of becoming surety. It then stood in relation to the federal government as an insurer against possible loss or damage by reason of the fault of its officials. *It did not undertake to perform the officials' duties.* It did not exercise any governmental function. It was not in the employ of the federal government. It was in no sense an instrumentality of government.

"The Act of Assembly which imposes the tax lays no tax on the bonds nor on the contracts of suretyship, and in this particular the present case is to be distinguished from the cases of *Ambrosini vs. U. S.,* 187 U. S. 1, and *Bettman vs. Warrick,* 108 Fed. 46, which have been called to our attention. The tax, as we have said, is a charge for the privilege of transacting business in the state, measured by the amount of the busines done."

(Record, page 16.)

Distinctions between who "selects" and who "accepts" a surety, between who "requests" and who "approves" (Sec. 1) the execution of a bond, between "acting *for*" and "contracting *with*" the Federal government, between "undertaking to perform the duties" of a government official and undertaking to make good the consequences of his failure to perform (*Cf. Thames & Mersey Ins. Co. vs. United States,* 237 U. S. 19), between "bonds" or "contracts of suretyship" and the "privilege" of executing bonds or making contracts of suretyship—are all refinements wholly aside from the question whether the defendant is or is not an instrumentality of the Federal Government in the performance of its Governmental func-

tions. Any direct burden on either of these supposedly different series of concepts is a direct burden on the exercise of the Governmental functions of the United States. The very reasoning of the State Court strongly illustrates this:

> "The federal government was not interested in having this defendant company rather than another engage to answer for the conduct or the acts of its officials. If the defendant had refused to act as surety, a domestic company or an individual surety or sureties would have answered. It might just as well be said that the individual sureties required before the Act of Congress was passed were acting for the federal government in matters of this kind."

This at once discloses the breadth, and demonstrates the unsoundness, of the State's contention, viz, that *the State of Pennsylvania can abolish corporate suretyship on Federal bonds in Pennsylvania.* In many instances, *this means that one State can prohibit or suspend the operations of the Federal government.* The whole business of surety companies, as everybody knows, has been built upon the difficulty of obtaining satisfactory individual sureties. With the growth of this business, this difficulty has increased. Conversely, bonds are now required in forms or amounts which, in the days of individual suretyship, were unknown and impossible. Outside of the Post Office Department, more than 90 per cent. of all official bonds running to the Federal Government now have corporate sureties. (Senate Report No. 1260, 61st Congress, 3d Session, pages 2, 19.) Any State can, if it sees fit, return, as to State and private business, to individual suretyship. No State can, however, require the Federal Government to abandon corporate suretyship without seriously interfering with the operations of the Federal government and virtually repealing an Act of Congress.

The Federal government may not be "interested in having this defendant company rather than another" as surety on

Federal bonds,—provided there be "another" just as satisfactory and just as available on just as good terms. The Federal government is, however, vitally interested in keeping the field of choice just as large as Congress has made it. One State has no more right to narrow that field than it has to destroy it altogether by prohibiting the execution, by either corporations or individuals, of Federal bonds in Pennsylvania.

The State Court's unhappy analogy to individual suretyship implies as much. If "individual sureties required before the Act of Congress was passed" were *not* "acting for the Federal government in matters of this kind," is it suggested that a State could have prohibited individuals from acting as sureties on Federal bonds, could have taxed them for so doing, or could have burdened, or interfered in any way with, the execution of Federal bonds by individual sureties? If so, what does the supremacy and independence of the Federal government amount to? If not, what greater power has a State to interfere with the execution of Federal bonds by *corporate* sureties?

The *sole purpose* for which bonds are *required* by the laws of the United States is as an aid in the *execution of the laws* of the United States or the *administration of justice* in the Federal Courts. The *governmental nature* of the *undertaking* of the *principal* and that of the *surety* is exactly the same. Both are parties to the same contract with the United States. The surety makes good what the principal fails to perform. Any burden upon the execution of bonds by sureties is a burden upon the procuring of sureties by principals and the procuring of bonds by the Government, and hence is a *burden* upon *the execution of the laws of the United States* or *the administration of justice* in the Federal Courts, the ends for which such bonds are required.

Ambrosini vs. United States, 187 U. S. 1, and *Bettman vs. Warwick*, 108 Fed. 46 [Circuit Court of Appeals, Sixth

Circuit; opinion by MR. JUSTICE LURTON, MR. JUSTICE DAY concurring (then Circuit Judges); cited in *Ambrosini vs. United States*] are not distinguishable. Taxes on a liquor license bond and a notary's official bond were held invalid, not because of any refined distinctions between a tax on a bond and a tax on the privilege of executing the bond, but because they were taxes *on the exercise of a governmental function* (*Cf. Flaherty vs. Hanson*, 215 U. S. 515, 525). Seventy-odd years ago this Court, in reversing the Supreme Court of Pennsylvania, brushed aside a similar distinction between a tax on an office and a tax on the emoluments of the office. (*Dobbins vs. Erie County*, 16 Peters, 435, 445).

A State has no power to burden litigation (*Missouri Pacific Ry. Co. vs. Larabee*, 234 U. S. 459), or to regulate the giving of judicial bonds, in the Federal Courts (*Tullock vs. Mulvane*, 184 U. S. 497). Except judicial bonds, most of the bonds involved in this case are bonds in which the United States has not only a governmental but also a pecuniary interest,—frequently the sole pecuniary interest (*e. g.*, bonds to secure United States deposits). Even when the United States has no immediate pecuniary interest, it has a real, not merely nominal, interest in enforcing a contract made with it, by compelling payment to laborers and materialmen under bonds given pursuant to the Act of August 13, 1894, c. 280 (28 Stat. 278), passed the same day as the Act involved in this case (c. 282, 28 Stat. 279). (*United States Fidelity Co. vs. Kenyon*, 204 U. S. 349, 356-358.)

In support of this conclusion that the United States government has a real interest in the enforcement of bonds given under c. 280, this Court referred to c. 282, treating the two acts as *in pari materia*:

> "This interpretation of the statute finds some support in the above act of 1894, c. 282, passed the same day as the act, c. 280, for the protection of materialmen and laborers, and which provides that suits against a fidelity

> or guaranty corporation, accepted as surety in any recognizance, stipulation, bond or undertaking given to the United States, may be sued in any Court of the United States having jurisdiction of suits upon such instrument. There is in that act no express limitation as to the amount involved in suits of that character in either of the acts passed in 1894. Taking the two acts together, there is reason to say that Congress intended to bring all suits, embraced by either act, when brought in the name of the United States, within the original cognizance of the Circuit Courts of the United States, without regard to the amount in dispute."
>
> 204 U. S. 358.

The reasoning of this Court in nowise suggests that the execution of bonds under the Act of Congress involved in this case (c. 282) is a matter which is foreign to the exercise of the governmental functions of the United States, or in which surety companies act "for themselves and their principals," not "for the Federal Government."

(C) In the State Courts, the Attorney-General quoted at length from cases (*National Bank vs. Commonwealth*, 9 Wall. 353; *Railroad Company vs. Peniston*, 18 Wall. 5; *Thomson vs. Pacific Railroad*, 9 Wall. 579; cited and distinguished in *Farmers Bank vs. Minnesota, supra*), holding that "taxes upon the mere *property* of agencies of the Federal government" are valid, because they do not, like taxes upon the *business* or *operations* of such agencies, "interfere with or impair their efficiency in performing the functions by which they are designed to serve that government." From these authorities he argued that as this particular defendant "is of too good financial standing to suggest" that this particular tax will "hinder or impede it from discharging" its obligations to the Government, the tax on its business is, therefore, valid. The statement of this argument is sufficient refutation of it.

—Relying on the same authorities, the Attorney-General also quoted a Virginia case (*Western Union Tel Co. vs. Richmond*, 26 Gratt. 1), decided forty years ago, holding that the same reasoning sustains a tax upon *business* as well as a tax upon *property*. As this Court has since repeatedly held the contrary, and the Virginia Court relied principally on two since overruled cases (*Osborne vs. Mobile*, 16 Wall. 479; *State Tax on Railway Gross Receipts*, 15 Wall. 284,) this argument is, to say the least, obsolete.

—Both the Attorney-General and the Court laid stress on the fact that the Government did not directly *pay* the premiums upon which the State imposes this tax,—though it, of course, furnished the entire *consideration* for such premiums by *accepting* the bonds as conditions precedent to the qualification of Government officials or the doing of other governmental acts. This is immaterial. The Government did not pay or receive the proceeds of sale of the product of the Indians' mines. Nor does a State pay for a liquor license bond or the bond of a notary public,—or even pay the Notary's salary. "The test as to whether a notary is engaged in the exercise of the governmental powers of the State does not depend upon how his compensation is provided." (*Bettman vs. Warwick*, 108 Fed. 46, 48.)

The Act of August 5, 1909, though it provides that the United States shall not pay the premium on bonds of Federal officers, manifests the interest of the United States in the cost of such bonds by limiting the amount its officers shall pay for them.

Opinions of Attorneys-General.

On October 28, 1909, Mr. Wade H. Ellis, Assistant to the Attorney General, gave an opinion, approved by Attorney-General Wickersham, to the Secretary of the Treasury, holding that the Treasury Department "should not accept the

bond of a surety company in a State in which the company is forbidden by the laws of the State to do business." This conclusion was reached by Mr. Ellis by the following reasoning:

> "The Supreme Court has repeatedly held that it is a matter entirely within the power of each State to prescribe the conditions under which a corporation incorporated in another State may do busines within its borders. In view of these decisions it is not to be supposed that Congress intended to confer upon a surety company, foreign to the State of Washington, the power to do business in Washington with the United States in contravention of the laws of the State of Washington. Rather, it is to be inferred that Congress intended to prescribe the conditions applicable to a surety company wishing to do business with the United States in a State other than its State of incorporation, subject always to the further condition that the surety company had a right, under the laws of the State, to do business therein. The conditions imposed by Congress as to surety companies doing business outside the State of incorporation, safeguard the United States in States where there are no State laws on the subject; but, where there are State requirements, the statute of August 13, 1894, is supplemental to and not exclusive of the laws of the State.
>
> "Therefore it is my opinion that your Department should not accept the bond of a surety company in a State in which the company is forbidden by the laws of the State to do business."
>
> 28 Opinions of Attorney-General, 34, 39.

No authorities are cited in support of this reasoning. On the contrary, the decisions of this Court, hereinbefore cited, hold that "it is *not* a matter entirely within the power of each State to prescribe the conditions under which a corporation incorporated in another State may do business, within its borders, *with the United States.*"

This opinion by Mr. Ellis was rendered only two months before the accrual of the tax claimed in this case, more than

fifteen years after the passage of the Act of August 13, 1894. The previous practice of the Treasury Department (as the communication quoted in Mr. Ellis' opinion shows) had been opposed to this opinion. Three years earlier (April 26, 1906) MR. JUSTICE MOODY, then Attorney-General, had expressly refrained from deciding the question passed upon by Mr. Ellis (25 Op. Atty.-Gen. 598, 601). A still earlier opinion by Attorney-General Griggs is in accord with our present contentions and with the practice of the Executive Departments prior to the opinion of Mr. Ellis. Attorney-General Griggs, in the course of an opinion dated March 30, 1899, said (italics ours):

> "Practically the two questions to be decided by the Attorney General before admitting a company as qualified to give bonds to the United States are, that the company has appropriate corporate power, and that the company is solvent. * * * With reference to the provision found in the laws of several of the States, relating to surety companies, to the effect that no such company shall incur in behalf or on account of any one person, partnership, association or corporation, a liability for an amount larger than one-tenth of its paid-up capital, unless it shall be secured from loss thereon beyond that amount by suitable and sufficient collateral agreements of indemnity, I have to remark that if such a provision is contained in the act under which any particular surety company is incorporated, and is thereby made a part of its charter, then to that extent it restricts the corporate power of such company in its dealings with the United States Government. *If*, however, such *State statute refers*, not to the charter powers, but to the general powers of *all companies transacting surety business within the limits of such State, then it* is not operative beyond the limits of such State, and *would have no effect in transactions with the Federal Government.*"
>
> 22 Op. Atty.-Gen., 421, 423-424.

Even Mr. Ellis' reasoning (the soundness of which we dispute) would apparently not support a State *tax* or *burden* on

Federal business. The particular State statutory provisions mentioned in his opinion did not relate to taxation, but required (presumably to "safeguard" those with whom such companies do business) paid-up and unimpaired capital of not less than $350,000. Mr. Ellis apparently assumes that State statutes permit foreign surety companies to do business, but prescribe conditions, which he treats as "safeguards" supplemental to the Act of Congress. In this aspect, the matter would seem analogous to the power of a State to enforce police measures which *safeguard* (*Atlantic Coast Line vs. Georgia*, 234 U. S. 280) or incidentally affect (*Western Union Tel. Co. vs. Commercial Milling Co.*, 218 U. S. 406) Federal business which the State cannot directly *regulate* (*West. Un. Tel. Co. vs. Brown*, 234 U. S. 542, 547) or *tax* (*Williams vs. Talladega*, 226 U. S. 404).

Be this as it may, the decisions of this Court—especially those more recent than the opinion of Mr. Ellis—leave no uncertainty or ambiguity to be resolved by an opinion from the Attorney-General's office which reversed the practical construction by the Executive Departments of an Act of Congress that had been in force for fifteen years, and seemingly overruled, without mentioning, a previous opinion of Attorney General Griggs, and which does not directly touch the question in this case.

Conclusion.

The power claimed by the State of Pennsylvania in imposing this tax is of much larger consequence than the amount of this particular tax. Insurance companies, and the general business of insurance, have long been regarded as peculiarly illustrative of the plenary control of the States over corporations and business within their respective limits. (*Security Co. vs. Prewitt*, 202 U. S. 246; *Harrison vs. St. L. & San Francisco R. R.*, 232 U. S. 318, 332; *New York Life Ins. Co. vs. Deer Lodge County*, 231 U. S. 495; *Paul vs. Virginia*, 8 Wall. 168.) The existence and extent of such State control is not an academic matter. Many cases

in this Court illustrate the great variety of State legislation concerning insurance, and the diversity of policy exhibited in different States in dealing with the subject. (*German Alliance Ins. Co. vs. Kansas*, 233 U. S. 389; *German Alliance Ins. Co. vs. Hale*, 219 U. S. 307; *Carroll vs. Greenwich Insurance Co.*, 199 U. S. 401.) The record (page 20) in the case of *Equitable Life Society vs. Pennsylvania*, 238 U. S. 143, shows that the Equitable Society, though it does business in "all the nations of the world with very few exceptions" and in forty-six States of the Union, does *not* do business in Texas or Wisconsin,—obviously a result of the differences in legislative policy in different States.

Insurance, however, is not beyond the scope of any constitutional provision which may be applicable to the facts of any particular case. (*Thames & Mersey Ins. Co. vs. United States*, 237 U. S. 19.) The business of surety companies is a form of insurance which is, to a large extent, transacted with governments and governmental bodies. With respect to their State and private business, the operations of such companies are subject to the same plenary State control as any other purely local business. With respect to Federal business, however, diversity of State control and regulation must yield to uniformity under the Act of Congress. Congress has prescribed the single uniform policy and procedure to govern all business with the Federal government.

The power asserted by the State of Pennsylvania in this case is a power of plenary control over the transaction of business with the Federal government and the exercise of governmental functions of the Federal government. It would override an Act of Congress. A judgment sustaining such an assertion of power cannot stand.

Respectfully submitted.

CHARLES F. PATTERSON,
CHARLES MARKELL,
Counsel for Fidelity and Deposit Company of Maryland, Plaintiff in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1915.

No. 114

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Plaintiff in Error*,

vs.

COMMONWEALTH OF PENNSYLVANIA, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR

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FRANCIS SHUNK BROWN,
Attorney General.

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In the Supreme Court of the United States

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Plaintiff in Error,

vs.

Commonwealth of Pennsylvania,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.

Question Involved.

Are the premiums received from business done in the State of Pennsylvania by the Plaintiff in Error, as surety on bonds given in matters of internal revenue, customs, United States Government officials, United States Government contracts, and in litigation in United States Courts, exempt from taxation by the State of Pennsylvania, upon the ground that in becoming such surety, Plaintiff in Error is operating un-

made as required by existing laws, whereupon * * such company shall also annually, in the month of January, file with the Insurance Commissioner a statement similar to that hereinbefore in this section provided for."

The Plaintiff in Error having complied with the provisions of this Act of Assembly was authorized to do business in Pennsylvania.

The tax is imposed by the Act of Assembly approved June 28, 1895, Pamphlet Laws 408, which provides, inter alia,

> "That hereafter it shall be the duty of the president, secretary or other proper officer of each and every insurance company or association, incorporated by or under any law of this Commonwealth, * * * * * to make report in writing * * * * and every such company * * * shall pay into the State treasury, semi-annually on the last days of January and July, in addition to any other taxes to which it may be liable under the first and twenty-first sections of this act, a tax of eight mills on the dollar upon the gross amount of said premiums and assessments received from business transacted within this Commonwealth. * * * *And provided further, That hereafter the annual tax upon premiums of insurance companies of other States or foreign governments, shall be at the rate of two per centum upon the gross premiums of every character and description received from business done within this Commonwealth within the entire calendar year preceding.*"

The Plaintiff in Error rests its contention on the Act of Congress of August 13, 1894, Chapter 282, 28 St. at L. 279, which is entitled:

"An Act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereon."

It provides, in part, as follows (italics ours):

"That whenever any recognizance, stipulation, bond, or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing anything in such recognizance, stipulation, bond or undertaking specified, is by the laws of the United States required or permitted to be given with one surety or with two or more sureties, the execution of the same or the guaranteeing of the performance of the condition thereof shall be sufficient when executed or guaranteed *solely by a corporation incorporated under the laws of the United States, or of any State having power to guarantee the fidelity of persons* holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings: Provided, That such recognizance, stipulation, bond, or undertaking be approved by the head of department, court, judge, officer, board, or body executive, legislative, or judicial required to approve or accept the same. *But no officer or person having the approval of any bond shall exact that it shall be furnished by a guarantee company or by any particular guarantee company.*"

Section 2 provides for the appointment of agents "residing within the jurisdiction of the Court for the judicial district wherein such suretyship is to be undertaken," and requires "a copy of such power of attorney duly certified and authenticated shall be filed with the clerk of the District Court of the United States for such district."

It also provides in the case of a vacancy, for the

appointment of another agent, and that during such vacancy or absence of any agent "service of process may be upon the clerk of the Court wherein such suit is brought."

Section 3 provides for a copy of the charter to be filed with the Attorney General and that

> "If the said Attorney General shall be satisfied that such company has authority under its charter to do the business provided for in this Act, and that it has a paid up capital of not less than $250,000 in cash or its equivalent, and is able to keep and perform its contracts, he shall grant authority in writing to such company to do business under this Act."

Section 4 provides for quarterly reports and for revocation of the authority; Section 5 confers jurisdiction upon the United States in suits upon such recognizances, stipulations, bonds and undertakings; Section 6 provides for a forfeiture of rights upon failing to pay judgments; Section 7 provides that companies having executed any instruments shall be estopped for denying power to execute the same, and Section 8 provides the penalties for failing to comply with the provisions of the Act.

Contentions of Defendant in Error.

The Defendant in Error contends that to secure exemption from State taxation a corporation must show,

(a) THAT IT IS OPERATING UNDER A FEDERAL FRANCHISE OR,

(b) THAT IT IS OPERATING AS A FEDERAL AGENCY OR INSTRUMENTALITY, AND THAT SUCH TAXATION MAY INTERFERE WITH OR IMPAIR ITS EFFICIENCY IN PERFORMING THE FUNCTIONS BY WHICH IT SERVES THE GOVERNMENT.

AND THAT

1. THE PLAINTIFF IN ERROR IS NOT OPERATING UNDER ANY FEDERAL FRANCHISE WHATEVER, IN RESPECT TO THIS TAX.

2. THE PERMISSION TO DO BUSINESS GIVEN BY ACT OF CONGRESS DOES NOT CONSTITUTE A FEDERAL FRANCHISE.

3. THE PLAINTIFF IN ERROR IS NOT ACTING AS A FEDERAL AGENT OR USING ANY GOVERNMENT INSTRUMENTALITY IN BECOMING SURETY UPON THE BONDS UPON WHICH THE TAX IS SOUGHT TO BE IMPOSED.

4. THERE IS NO ALLEGATION OR EVIDENCE THAT, EVEN IF ACTING AS A FEDERAL AGENT, THE IMPOSITION OF THE TAX WOULD IN ANY WAY IMPAIR THE EFFICIENCY OF THE PLAINTIFF IN ERROR TO PERFORM ITS DUTY TO THE GOVERNMENT.

5. THE PREMIUMS TAXED HAVE NOT BEEN PAID BY THE FEDERAL GOVERNMENT WHICH IS CONCERNED ONLY WITH SECURING A SUFFICIENT BOND WHETHER THE SURETIES BE INDIVIDUALS OR CORPORATIONS.

Argument.

NATURE OF THE TAX.

The Plaintiff in Error has indulged in an elaborate and somewhat tedious review of the history of taxation in Pennsylvania, generally, with some slight reference to taxation of insurance companies in particular, all to little purpose. There is not now and never has been any serious doubt about the nature of this tax. It is a tax imposed by the State of Pennsylvania upon foreign insurance companies on the business done within the State of Pennsylvania.

In the case of *Germania Life Insurance Company* vs. *Commonwealth of Pennsylvania*, *85 Pa. 513*, the Court below used this language:

> "The Legislature could say to the foreign insurance company, you shall establish no agency in Pennsylvania, or they could declare, we will permit it on condition that you pay into the Treasury a certain sum, * * * which may be called a tax, or by any other name."

The Supreme Court affirmed the case in a per curiam sustaining the Act of April 4, 1873, which was similar to the Act in question.

The Court of Common Pleas of Dauphin County said, in this case:

> "The tax which is now claimed is an exaction for the privilege of doing business in the State." (Record, page 15.)

The Supreme Court of Pennsylvania affirmed the judgment on the opinion of the judge of the Common Pleas Court.

In the case of *Commonwealth* vs. *Equitable Life Assurance Society of the United States, 239 Pa. 288,* which was reviewed and sustained by this Court, *238 U. S. 143,* Mr. Justice Holmes said:

> "But, as we have said, the Supreme Court of Pennsylvania speaks of it is a tax for the privilege of doing business within the commonwealth; and whether the statement is a construction of the act or not, we agree with it so far, at least, as to assume, that if that characterization is necessary to sustain the tax, the legislature meant to avail itself of any power appropriate to that end."

The Commonwealth of Pennsylvania does not now claim, and never has claimed, that this was a tax upon property of foreign insurance companies. It is a condition upon which they do business in the State. That this business is done in the State is admitted. The bonds are executed and furnished within the State of Pennsylvania and the premiums paid by persons within the State of Pennsylvania. (Record, page 14.)

The case of *Commonwealth* vs. *Equitable Life Assurance Society, 239 Pa. 288; 238 U. S. 143,* settled the proposition that this business was done within the State of Pennsylvania, even though the premiums might have been sent to the home office of the company, in Maryland.

The condition upon which the defendant gets its right to do this business in Pennsylvania, is that it will pay the tax "upon the gross amount of said premiums and assessments received from business transacted within this Commonwealth."

It is well settled that the defendant, having come into the State, must comply with the conditions which the State has imposed.

In *Hooper* vs. *California*, *155 U. S. 648*, Mr. Justice White said, page 562:

> "The principle that the right of a foreign corporation to engage in business within a State other than that of its creation, depends solely upon the will of such other State, has been long settled, and many phases of its application have been illustrated by the decisions of this court. (Citing many cases.)
>
> Whilst there are exceptions to this rule, they embrace only cases where a corporation created by one State rests its right to enter another and to engage in business therein upon the Federal nature of its business. As, for instance, where it has derived its being from an act of Congress, and has become a lawful agency for the performance of governmental or *quasi* governmental functions, or where it is necessarily an instrumentality of interstate commerce, and is, therefore, solely within the paramount authority of Congress. In these cases, the exceptional business is protected against interference by State authority."

Western Union Telegraph Company vs. *Kansas*, *216 U. S. 1, 46, 69.*

List vs. *Commonwealth of Pennsylvania*, *118 Pa. 322.*

Thorne vs. *Travelers Insurance Company*, *80 Pa. 28.*

And, as was said by Mr. Justice McKenna, in *Western Union Telegraph Co.* vs. *Missouri*, *190 U. S. 412, 47 L. Ed. 1116,*

"The Court did not test or measure the power of the State by the name which its laws gave the tax."

I.

THE PLAINTIFF IN ERROR IS NOT OPERATING UNDER ANY FEDERAL FRANCHISE WHATEVER, IN RESPECT TO THIS TAX.

An inspection of the Act of Congress will at once demonstrate that Congress has granted no franchise. The title of the Act is "An Act relative to recognizances, stipulations and undertakings and to ALLOW certain corporations to be accepted as surety thereon."

The Act of Congress recognizes the corporations of "any State having power to guarantee the fidelity of persons." *That is to say, it recognizes the franchises conferred by states.*

The Act of Congress does not DIRECT the giving of security by a corporation, it simply permits the corporation to become surety under certain conditions. The Act in its entirety shows that it was framed with a view of PERMITTING corporate suretyship and of providing a method for collecting the penalty of bonds in case of default. The Act itself shows no intention to grant any right which resembles a franchise. The Plaintiff in Error had its franchise from the State of Maryland. It came into Pennsylvania, and, complying with the laws of Pennsylvania, was authorized to do business there. The Act of Congress simply permitted it to take the place of individual sureties.

The Court of Common Pleas of Dauphin County said (Record, page 15, italics ours):

> "*We find nothing in the Act of Congress to support the proposition that the defendant was authorized by it to transact its business in the State of Pennsylvania.*
>
> "The Act is silent as to a place where the contract of suretyship is to be entered into. True, it is provided in Section 2 that no company shall do business under the provisions of the Act beyond the limits of the State, or territory under whose laws it was incorporated and in which its principle office is located until it shall appoint an agent or attorney within the jurisdiction of the Court for the judicial district wherein such suretyship is to be undertaken. But the manifest object of that provision was to seure and make convenient the service of legal process upon the company. *It would be a strained interpretation of the section to hold that it authorized surety companies coming within its provisions to enter a State and therein transact business without the consent of the State, or without complying with the conditions or terms which the State might prescribe.*"

The theory upon which this immunity from taxation is claimed, is that it is inconsistent for one branch of the Government to raise money by taxing another branch of the Government, or that one branch of the Government should not impede or hinder the operation of another. The fact that Congress of the United States has provided certain regulations with which the surety companies must comply before being accepted on bonds running to the United States, is not conferring a federal franchise. It is only permitting the giving of a bond with a surety instead of individual surety.

The leading case upon this general subject is *McCulloch* vs. *Maryland*, 4 *Wheat.* 415, 4 *L. Ed.* 579. In

that case the question arose as to whether the State of Maryland has the right to tax a branch of the bank of the United States. It is plain that the decision rests exclusively upon the principles that the State was attempting to tax a franchise of the federal government.

Chief Justice Marshall said, page 430: (Italics ours)

> "If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those *powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution.* We have a principle which is safe for the States, and safe for the Union."

After further discussing the whole subject he said, page 433:

> "But when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves."

Page 435:

> "The court has bestowed on this subject its most deliberate consideration. *The result is a conviction*

that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

The Federal government has not granted a franchise to the Plaintiff in Error to become surety on bonds.

The imposition of a tax in that case was upon the operations of the Bank of the United States which existed solely under a franchise granted by Congress.

The same is true of the *Farmers and Mechanics Savings Bank of Minneapolis* vs. *State of Minn., 232 U. S. 516; 58 L. Ed. 706*, where this Court held that bonds issued by municipalities in the Indian Territory and the Territory of Oklahoma, were exempt from taxation by the State of Minnesota.

The power to issue these bonds was derived exclusively from Congress.

They were issued by a subordinate agency of the United States. In that case Mr. Justice Pitney clearly distinguishes the principle there applied from what must be applied in this case. He said, page 526:

> "But we deem it entirely clear that a tax upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the government, and not in any sense a tax upon the property of the municipality. And to tax the bonds as property in the hands of the holder is, in the last analysis, to impose a tax upon the right of the municipality to issue them. * * * * * It is on this ground that United States bonds have always been held exempt from taxation under authority of the states. By like reasoning it has come to be *recog-*

nized that bonds issued by the states are not taxable by the Federal Government."

This case, therefore, though relied on by the Plaintiff in Error, is not authority for it.

So in the case of *Choctaw & Gulf R. R. Company* vs. *Harrison, 235 U. S. 292*, there was no question but that the tax imposed was upon a Federal instrumentality. The claim for the tax was on the sales of coal dug from the mines belonging to the Choctaw and Chickasaw Indians under a lease made pursuant to Congressional authority. The Indians were wards of the United States. The lease was made under the supervision of the United States in the protection of its wards. After citing the Act of Congress, Mr. Justice McReynolds, said (page 298):

> "From the foregoing it seems manifest that the agreement with the Indians imposed upon the United States a definite duty in respect to opening and operating the coal mines upon their lands, and appellant is the instrumentality through which this obligation is being carried into effect."

In the case of *California* vs. *The Central Pacific Railroad Company, 127 U. S. 1; 32 L. Ed. 150*, this Court said:

> "It conclusively appears, therefore, that the Southern Pacific Railroad Company did receive from the United States government, and still enjoys important franchises connected with its railroad."

The assessments complained of "comprise the value of franchies or property which the Board was prohibited by the Constitution of the State from including therein," and the assignments were declared void.

What constitutes a Federal franchise so as to be ex
empt from State taxation, is clearly stated by M
Justice Day, in *Flint* vs. *Stone Tracy Co., 220 U. S. 107*
55 L. Ed. 389, on page 152: (Capitals ours)

> "IT HAS BEEN HELD IN A NUMBER OF CASES THA
> THE STATE CANNOT TAX FRANCHISES CREATED BY TH
> UNITED STATES OR THE AGENCIES OR CORPORATION
> WHICH ARE CREATED FOR THE PURPOSE OF CARRYIN
> OUT GOVERNMENTAL FUNCTIONS OF THE UNITE
> STATES. (CITING CASES.)
>
> AN EXAMINATION OF THESE CASES WILL SHOW THA
> IN SUCH CASE WHERE THE TAX WAS HELD INVALID, TH
> DECISION RESTED UPON THE PROPOSITION THAT TH
> CORPORATION WAS CREATED TO CARRY INTO EFFEC
> POWERS CONFERRED UPON THE FEDERAL GOVERNMEN
> IN ITS SOVEREIGN CAPACITY, AND THE ATTEMPTED TAX
> TION WAS AN INTERFERENCE WITH THE EFFECTUA
> EXERCISE OF SUCH POWERS."

The Fidelity and Deposit Company of Maryland, i
becoming surety on these bonds is not "carrying int
effect powers conferred upon the Federal government i
its sovereign capacity." The Federal government doe
not give bonds in its sovereign capacity, and is no
engaged in that business and has conferred no suc
franchise upon this company.

The case of *McCulloch* vs. *Maryland, supra*, was fo
lowed by the case of *Thompson* vs. *Railroad Compan*
9 Wall 579; 19 L. Ed. 792.

In that case the Union Pacific Railroad Compan
Eastern Division, was originally incorporated by th
Legislature of the Territory of Kansas. Subsequentl
the Union Pacific Railroad Company was incorporate
by Congress so as to form a connecting road with th
Union Pacific Railway Company, Eastern Divisio

The Kansas Company received United States Government aid in bonds and land and constructed its road to become a link in the transcontinental line known as The Pacific Union System. The State of Kansas subsequently taxed the road bed, rolling stock and certain personal property of the corporation. Its stockholders sought to enjoin the collection of the tax on the ground that the property was mortgaged to the United States and that it was bound under the Congressional grant to perform certain duties and ultimately pay five per cent. of its net earnings to the United States, and that State taxation would retard and burden it in the discharge of its obligations to the general government.

Mr. Chief Justice Chase said: (Italics ours)

> "But we are not aware of any case in which the real estate or other property of a corporation not organized under an act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government.
>
> * * * * * * * * * * * * *
>
> *It is true that some of the reasoning in the case of McCulloch* vs. *Maryland seems to favor the broader doctrine. But the decision itself is limited to the case of the bank, as a corporation created by a law of the United States, and responsible, in the use of its franchise, to the government of the United States.*
>
> * * * * * * * * * * * * *
>
> No one questions that the power to tax all property, business and persons, within their respective limits, is original in the States and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the national

government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection."

This case was followed by the case of *Railroad Company* vs. *Penniston, 18 Wall 5; 21 L. Ed. 787.* By the Act of Congress the Union Pacific Railroad Company was given authority to build a continuous railroad and telegraph from a point on the one hundredth meridian to the western boundary of Nevada Territory. The act fixed the amount of the capital stock, and shares, and declared that "the stockholders should constitute said body politic and corporate." *The government took no stock in the road. Annual reports were to be made to the Secretary of the Treasury. The act granted the company the right of way through the public lands, and "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and the public stores thereon," made to it an extensive grant of land.* The State of Nebraska laid a tax on the property of the railroad upon a valuation of $16,000 per mile for a length of one hundred and seventy-six miles. The tax was resisted on the theory that the road was an agency of the federal government, but this court sustained it.

Surely there was more of a franchise granted in this case than to the Plaintiff in Error in the case now before the Court.

In the case of *Central Pacific Railroad Company* vs. *California, 162 U. S. 92; 40 L. Ed. 702,* there was an attempt to escape taxation by the State of California

because a part of the franchises used by the corporation were derived from Congress.

Mr. Chief Justice Fuller, quoting from Union Pacific Railroad Company *vs.* Penniston, said, page 119: (Italics ours)

> "*It cannot be that a state tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property.* Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, coexistent with the national government. Neither may destroy the other. Hence the Federal constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise. * * * ."

II.

THE PERMISSION TO DO BUSINESS, GIVEN BY ACT OF CONGRESS, DOES NOT CONSTITUTE A FEDERAL FRANCHISE.

The cases of *Williams* vs. *Talladega, 226 U. S. 404, 57 L. Ed. 275; Postal Telegraph Cable Company* vs. *Charleston, 153 U. S. 692, 38 L. Ed. 871; Western Union Telegraph Company* vs. *Missouri, 190 U. S. 412, 47 L. Ed. 1116;* and *Western Union Telegraph Company* vs. *Richmond, 224 U. S. 160, 56 L. Ed. 710,* seem to settle the proposition that the Plaintiff in Error in this

case is not exercising a franchise granted by the Federal government. They also affirm the right to impose a license or franchise tax upon a corporation doing business by permission of an Act of Congress.

In the case of *Williams* vs. *Talladega, supra*, the ordinance of the City of Talladega required telegraph companies to take out licenses. Williams was the agent of the Western Union Telegraph Company, and was convicted of doing business without taking out a license and paying the fee required therefor. The Western Union Telegraph Company, a corporation of the State of New York, had accepted the provisions of the Act of Congress of July 24, 1866 (14 Stat. at Large 221, Chap. 230, U. S. Rev. Stat. Sections 5263-5268), had an office in the City of Talladega "and was engaged in the business of transmitting messages between private parties and between the departments and agencies of the United States government from Talladega to other points in the state of Alabama, and also from other points in the state of Alabama to Talladega."

Mr. Justice Day says page 413: (Italics ours)

> "This case differs from some cases which have been in this court, involving the right to tax the Western Union Telegraph Company, in that it places emphasis upon the alleged immunity from taxation of the class herein involved, *because, it is contended, by the Act of 1866, Congress, by virtue of the authority given it to establish post roads, conferred Federal franchises upon the company, and made the Western Union Telegraph Company an instrumentality of the Federal government, endowed with franchises to construct, maintain and operate telegraph lines on the post roads of the United States, with the duty in the operation of those lines not only to serve the government of the*

United States, but also to serve the public which might wish to transact business over its lines. This being so, it is now insisted that the attempt to impose a license tax upon the company either by the state of Alabama or any of its municipalities, is an attempt to impose a tax on the franchises so created by the Federal government."

After quoting from the Telegraph Company cases above cited, he says, page 416: (Italics and capitals ours)

"These cases, taken together, establish the proposition that the privilege given under the terms of the act to use the military and post roads of the United States for the poles and wires of the company is to be regarded as permissive in character, and not as creating corporate rights and privileges to carry on the business of telegraphy, which were derived from the laws of the state incorporating the company, AND THAT THIS PERMISSIVE GRANT DID NOT PREVENT THE STATE FROM TAXING THE REAL OR PERSONAL PROPERTY BELONGING TO THE COMPANY WITHIN ITS BORDERS, OR FROM IMPOSING A LICENSE TAX UPON THE RIGHT TO DO A LOCAL BUSINESS WITHIN THE STATE."

In the case of *Postal Telegraph Cable Company* vs. *Charleston, supra,* there was an attempt to impose a license fee upon the Telegraph Company for business done within the City of Charleston. The company had also accepted the provisions of the Act of Congress of 1866. It was contended that it was exercising a Federal franchise. Mr. Justice Shiras said page 700:

"It is further contended that the ruling of the cited cases does not cover the case of a telegraph company which has constructed its lines along the

post roads in the city of Charleston, and elsewhere, and which is exercising its functions under the Act of Congress as an agency of the government of the United States. It is obvious that the advantages or privileges that are conferred upon the company by the Act of July 24, 1866 (Rev. Stat. Sections 5263-5268) are in the line of authority to construct and maintain its lines as a means or instrument of interstate commerce, and are not necessarily inconsistent with a right on the part of the State in which business is done and property acquired to tax the same, within the limitations pointed out in the cases heretofore cited."

In the case of *Western Union Telegraph Company* vs. *Missouri*, *supra*, the tax was upon property of the corporation, but was opposed upon the same ground as in the other telegraph cases, namely, that it was doing business in pursuance of the authority granted under the Act of Congress of July, 1866.

Mr. Justice McKenna said pages 423-424: (Italics and capitals ours)

"In Western U. Teleg. Co. vs. Atty. Gen., 125 U. S. 530, 31 L. Ed. 790, 8 Sup. Ct. Rep. 961, the effect of the Act of July, 1866, upon the power of the State to tax the property of telegraph companies was considered. The laws of Massachusetts imposed a tax upon the Western Union Telegraph Company on account of the property owned and used by it within that state, the value of which was ascertained by comparing the length of its lines within the state with the length of its entire lines. The tax was sustained. The Act of July, 1866, was urged against the tax as it is urged here.

The contentions of the company in that case were as it is in this, that it did not derive its existence

from the state of Missouri, but from the state of New York; that it did not do business in the state of Missouri by permission of that state, but by virtue of being an instrument of interstate commerce; *that its rights and privileges and franchises were conferred by the United States, and as such agent it was exempt from the tax imposed. The contentions were rejected. The court did not test or measure the power of the state by the name which its laws gave the tax, and, speaking by Mr. Justice Miller said:*

'The argument is very much pressed that it is a tax upon the franchise of the company, which franchise being derived from the United States by virtue of the statute above recited, cannot be taxed by a state, and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts it is essentially an excise upon the capital of the corporation. The laws of that commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein.'

AND THAT POWER OF THE STATE WAS EXPLAINED IN AN ELABORATE OPINION, AND SUSTAINED. THESE PROPOSITIONS WERE LAID DOWN: THE COMPANY OWNED ITS EXISTENCE AS A CORPORATION AND ITS RIGHT TO EXERCISE THE BUSINESS OF TELEGRAPHY TO THE LAWS OF THE STATE UNDER WHICH IT WAS ORGANIZED; THAT THE PRIVILEGE OF RUNNING THE LINES OF ITS WIRES

OVER AND ALONG THE MILITARY AND POST ROADS OF THE UNITED STATES WAS GRANTED BY THE ACT OF CONGRESS, BUT THAT THE STATUTE WAS MERELY PERMISSIVE, AND CONFERRED NO EXEMPTION FROM THE ORDINARY BURDENS OF TAXATION; THAT THE STATE COULD NOT, BY ANY SPECIFIC STATUTE, PREVENT A CORPORATION FROM PLACING ITS LINES ALONG THE POST ROADS OR STOP THE USE OF THEM AFTER THEY WERE SO PLACED, BUT THE CORPORATION COULD BE TAXED, IN EXCHANGE FOR THE PROTECTION IT RECEIVED FROM THE STATE 'UPON ITS REAL OR PERSONAL PROPERTY AS ANY OTHER PERSON WOULD BE.' "

In *Western Union Telegraph Company* vs. *Richmond, supra,* the attack was upon a municipal ordinance regulating and imposing a license fee, because the company had also accepted the Act of Congress of July 24, 1866.

Mr. Justice Holmes described the rights which the Act of Congress conferred as follows: (Italic ours.)

> "The Act of Congress, of course, conveyed no title, and did not attempt to found one by delegating the power to take by eminent domain. Western U. Teleg. Co. *vs.* Pennsylvania R. Co., 195 U. S. 540, 574, 49 L. Ed. 312, 324, 25 Sup. Ct. Rep. 133. It made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a State to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own. Pensacola Teleg. Co. *vs.* Western U. Teleg. Co., 96 U. S. 1, 23 L. Ed. 708. It has been held to prevent a State from stopping the operation of lines within the act by injunction for failure to pay taxes. Western U. Teleg. Co. *vs.* Atty. Gen., 125 U. S. 530, 31 L. Ed. 790. *But except in this negative sense, the statute is only permissive. It is not a source of positive rights.*"

We have not overlooked the fact that the property of railroads having franchises from the United States government is subject to taxation while the franchise itself is not. This argument has been directed to the proposition that what the Plaintiff in Error is doing, is not in the exercise of any franchise whatever from the government of the United States. Even if it were operating under a license from the Federal government it would not prevent State taxation.

> *Wiggins Ferry Co.* vs. *City of East St. Louis, 107 U. S. 365; 27 L. Ed. 419.*

While Congress might have exempted from taxation any premiums on bonds which run to the United States Government it did not do so.

As was said by Mr. Justice Brewer, in *Citizens Bank* vs. *Parker, 192 U. S. 73; 48 L. Ed. 346,* with reference to the cases which sustain the taxation of the property of railroads using United States franchises, (page 92): (Italics ours.)

> *"It was undoubted that Congress could in its discretion have provided for such exemption, but as it failed to prescribe it, the Court held that it did not exist."*

In the case of *Reagan* vs. *Mercantile Trust Company, 154 U. S. 413; 38 L. Ed. 1028,* it was contended that because the Texas and Pacific Railway Company was a corporation organized under the laws of the United States, it was not subject to control of the State, either in matters of taxation or rates, or other police regulation.

Mr. Justice Brewer said, page 416, after quoting from *Union Pacific* vs. *Penniston*: (Italics ours)

"Similarly we think it may be said that, conceding to Congress the power to remove the corporation in all its operations from the control of the State, there is in the act creating this company nothing which indicates an intent on the part of Congress to so remove it, and there is nothing in the enforcement by the State of reasonable rates for transportation wholly within the State which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress. By the act of incorporation Congress authorized the company to build its road through the State of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the State to other points also within the State, and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given to Congress. *It must have been known that, in the nature of things, the control of that business would be exercised by the State, and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from State control, it would unquestionably have expressed such intention in language whose meaning would be clear. Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the State, it intended that it should be subjected to the ordinary control exercised by the State over such business.*"

This language can be paraphrased and applied to the Act of Congress granting the Plaintiff in Error the right to become sole surety. It knew that when it permitted this Plaintiff in Error to become sole surety in business wholly within the State of Pennsylvania.

it would be subject to the same duties required by the State from other similar business done in the State by the Plaintiff in Error. The Act of Congress is silent upon the subject of exempting it from State taxation. Therefore, in the language of Mr. Justice Brewer:

> "Its silence in this respect is satisfactory assurance that in so far as this corporation should engage in business wholly within the State, it intended that it should be subject to the ordinary control used by the State over such business."

It follows from these authorities that only when the tax is directly laid upon a franchise granted by Congress that the State is prohibited from taxing the exercise of such franchise, and that there is no franchise emanating from Congress exercised by the Plaintiff in Error in becoming surety on bonds, upon which there is a mere contingent liability to the Federal government.

III.

THE PLAINTIFF IN ERROR IS NOT ACTING AS A FEDERAL AGENT OR USING ANY GOVERNMENT INSTRUMENTALITY IN BECOMING SURETY UPON THE BONDS UPON WHICH THE TAX IS SOUGHT TO BE IMPOSED.

It is conceded that if the Plaintiff in Error were exercising an agency, or performing the function of the Federal Government, and the premiums were paid for that service, they could not be taxed. It is further conceded that if the premiums were paid out of the Federal Treasury directly for Federal business, they could not be

taxed, or, if in becoming surety upon these bonds the Plaintiff in Error was exercising a franchise granted it by Congress, it would be exempt from taxation.

> "The necessary independence of the federal and State governments imposes a limitation upon the taxing power of each. Neither can so exercise its own power of taxation as to curtail the rightful powers of the other, or interfere with the free discharge of its constitutional functions, or obstruct, embarrass, or nullify its legitimate operations, or destroy the means or agencies employed by it in in the exercise of those powers and functions."

37 Cyc. 878, and Notes.
12 Am. & Eng. Ency. of Law, 2d. Ed. 367 & Notes.

Is the Plaintiff in Error in any sense a governmental agency?

Bonds upon which it is surety are in matters of internal revenue, United States customs, and for the faithful performance of United States contracts for United States government officials, for banks for United States deposits and bonds given in litigation pending in the United States courts.

The fact that the defendant company entered into contractual relations with a federal employee or with a contractor, for the protection of the United States government in case of default, is certainly not *federal business.*

The business relation between the defendant company and the person bonded is a purely personal one. The federal employee or contractor is at liberty to choose the surety he desires. He arranges with the surety for the amount of the premium to be paid, fixes the time of payment, and he pays the premium. All that the government requires under the act of Congress

is that the surety shall be financially sound, and shall be put in position where the government can readily proceed against it in case of default.

The tax is a tax on the defendant because of its contractual relations with the individuals, who in turn are in contractual relations with the government.

Such a relation is too far removed to say that the surety is using a federal instrumentality or agency. Such a surety has no relation with the government whatever, except in the default of the contractor or employee.

THE GOVERNMENT IS USING NOTHING. IT IS DOING NOTHING. IT IS PAYING NOTHING, AND IT GETS NOTHING FROM THE SURETY, EXCEPT IN THE EVENT OF A DEFAULT OF THE PRINCIPAL.

In the case of *Baltimore Ship Building and Dry Dock Company* vs. *Baltimore, 195 U. S. 375; 49 L. Ed. 242,* the Plaintiff in Error sought to escape taxation on land which was formerly owned by the United States, being part of the property known as Fort McHenry, which was sold by the United States to the Plaintiff in Error, with the reservation that:

> *"The dry dock company should conduct a dry dock upon the land as specified, which it did, and that it should 'accord to the United States the right to the use forever of the said dry dock at any time for the prompt examination and repair of vessels belonging to the United States, free from charge for docking, and if at any time said property hereby conveyed shall be diverted to any other use than that herein named, or if the said dry dock shall be at any time unfit for use for a period of six months or more, the property hereby conveyed, with all its privileges and appurtenances,*

shall revert to, and become the absolute property of the United States.'"

Certainly this dry dock company is more of an agency of the United States than the Fidelity and Deposit Company of Maryland as surety upon the bonds in question. The United States had a contingent right to recover this land. Its contingent right to call upon the Fidelity Deposit Company is quite as remote.

Mr. Justice Holmes said, page 382 (Capitals ours):

> "THE UNITED STATES HAS NO PRESENT RIGHT TO THE LAND, BUT MERELY A PERSONAL CLAIM AGAINST THE CORPORATION, REINFORCED BY A CONDITION, BUT, FURTHERMORE, IT SEEMS TO US EXTRAVAGANT TO SAY THAT AN INDEPENDENT PRIVATE CORPORATION FOR GAIN, CREATED BY A STATE, IS EXEMPT FROM STATE TAXATION, EITHER IN ITS CORPORATE PERSON OR ITS PROPERTY, BECAUSE IT IS EMPLOYED BY THE UNITED STATES, EVEN IF THE WORK FOR WHICH IT IS EMPLOYED IS IMPORTANT AND TAKES MUCH OF ITS TIME."

In the case of *United States* vs. *Moses*, *185 Fed. Rep. 90*, it was held:

> "Where the property of a contractor with the United States government, which, on default of the contractor, an officer has taken for use in completing the contract, is not exempt from taxation, in the absence of any Act of Congress to that effect; the government having no ownership therein."

The claim for exemption as stated in the report, was

> "That the United States was in rightful possession of the property and was claiming possession of the property as an offset to its claim

against the Widell-Finley Company for damages resulting from the breach of its contract, and that it was an instrumentality of the United States employed in a lawful public function, authorized by an Act of Congress when the taxes were levied and assessed, and it was therefore not subject to taxation by the taxing powers of the State."

The Court upon the authority of the cases hereinbefore referred to, said: (Italics ours.)

> *"The mere fact that the property was employed in the service of the government did not exempt it from taxation."*

In Railroad Company *vs.* Penniston, 18 Wall 5; 21 L. Ed. 787, Mr. Justice Strong, referring to the powers conferred upon the company by the national government said, (page 32):

> "They all look to a purpose of Congress to secure an agency competent and under obligation to perform certain offices for the general government. Notwithstanding this, the railroad and the telegraph line are neither in whole nor in part the property of the government. The ownership is in the complainants, a private corporation, though existing for the performance of public duties. The government owns none of its stock, and though it may appoint two of the directors, the right thus to appoint is plainly reserved for the sole purpose of enabling the enforcement of the engagements which the company assumed, the engagements to which we have already alluded.
>
> Admitting, then, fully, as we do, that the company is an agent of the general government, designed to be employed, and actually employed, in

the legitimate service of the government, both military and postal, does it necessarily follow that its property is exempt from State taxation?"

Page 33: (Capitals ours.)

"IT MAY, THEREFORE, BE CONSIDERED AS SETTLED THAT NO CONSTITUTIONAL IMPLICATIONS PROHIBIT A STATE TAX UPON THE PROPERTY OF AN AGENT OF THE GOVERNMENT MERELY BECAUSE IT IS THE PROPERTY OF SUCH AN AGENT. A CONTRARY DOCTRINE WOULD GREATLY EMBARRASS THE STATES IN THE COLLECTION OF THEIR NECESSARY REVENUE WITHOUT ANY CORRESPONDING ADVANTAGE TO THE UNITED STATES. A VERY LARGE PROPORTION OF THE PROPERTY WITHIN THE STATES IS EMPLOYED IN EXECUTION OF THE POWERS OF THE GOVERNMENT. IT BELONGS TO GOVERNMENTAL AGENTS, AND IT IS NOT ONLY USED, BUT IT IS NECESSARY FOR THEIR AGENCIES. UNITED STATES MAILS, TROOPS, AND MUNITIONS OF WAR ARE CARRIED UPON ALMOST EVERY RAILROAD. TELEGRAPH LINES ARE EMPLOYED IN THE NATIONAL SERVICE. SO ARE STEAMBOATS, HORSES, STAGE-COACHES, FOUNDRIES, SHIPYARDS, AND MULTITUDES OF MANUFACTURING ESTABLISHMENTS. THEY ARE THE PROPERTY OF NATURAL PERSONS, OR OF CORPORATIONS, WHO ARE INSTRUMENTS OR AGENTS OF THE GENERAL GOVERNMENT, AND THEY ARE THE HANDS BY WHICH THE OBJECTS OF THE GOVERNMENT ARE ATTAINED. WERE THEY EXEMPT FROM LIABILITY TO CONTRIBUTE TO THE REVENUE OF THE STATES IT IS MANIFEST THE STATE GOVERNMENTS WOULD BE PARALYZED. WHILE IT IS OF THE UTMOST IMPORTANCE THAT ALL THE POWERS VESTED BY THE CONSTITUTION OF THE UNITED STATES IN THE GENERAL GOVERNMENT SHOULD BE PRESERVED IN FULL EFFICIENCY, AND WHILE RECENT EVENTS HAVE CALLED FOR THE MOST UNEMBARRASSED EXERCISE OF MANY OF

THOSE POWERS, IT HAS NEVER BEEN DECIDED THAT STATE TAXATION OF SUCH PROPERTY IS IMPLIEDLY PROHIBITED."

In the case of *Van Brocklin* vs. *Anderson, 117 U. S. 151, 29 L. Ed. 845,* Mr. Justice Gray said, referring to the railroad cases heretofore cited in this brief:

> "That although the railroad corporations were the agents of the United States, the property taxed was not the property of the United States, but the property of the agents, and a State might tax the property of the agents provided it did not tax the means employed by the National government."

Mr. Justice Day, in the cast of *Flint* vs. *Stone Tracy Company, 220 U. S. 109, 55 L. Ed. 389,* explained the meaning of instrumentalities of the government as follows, page 152:

> "This proposition is rested upon the implied limitation upon the powers of national and State governments to take action which encroaches upon or cripples the exercise of the exclusive power of sovereignty in the other."

And on page 157: (Italics ours.)

> "The cases unite in exempting from Federal taxation the means and instrumentalities employed in carrying on the government operations of the State. *The exercise of such rights as the establishment of a judiciary, the employment of officers to administer and execute the laws, and similar governmental functions, cannot be taxed by the Federal government."*

This definition of State instrumentalities, applies as well to Federal instrumentalities.

The Plaintiff in Error is certainly not exercising any governmental function within this definition.

In the case of *Western Union Telegraph Company* vs. *City of Richmond, 26 Grat. (Va.) 1*, an attempt was made to evade the license tax upon the ground that the company was engaged in interstate commerce, and that it was a tax on a governmental agency.

After quoting from the case of *Thompson* vs. *Pacific Railroad, 9 Wall. 579*, the Court of Appeals of Virginia said (page 34): (Italics ours.)

> "*These observations apply as strongly to a tax upon business as a tax upon property. Indeed, there is no valid distinction between the two, so far as the principles of this case are concerned. The cases do recognize a distinction between taxation of the property belonging to a private corporation employed by the general government and taxation of the instrumentalities or means of the government in the possession of such corporation. The State may tax a banking institution, but it cannot tax the currency or the government bonds belonging to such bank. It may tax the railroad, but not the mail or the munitions or other property of the government. It may tax the contractor with the government, though not the contract. Such tax may be upon the property of the corporation, or it may be graduated by the amount of its business. It is no concern of the Federal government, provided the tax is not prohibitory, or, at least, does not impair the efficiency of the corporation in the fulfillment of its contract with the government.* Indeed a tax upon business in many instances is the only just and practicable mode of

assessment. Chartered companies and individuals may carry on business to the amount of thousands of dollars without owning property, real or personal, of any conceivable value. If, whenever they happen to be employed in the service of the government, they are to be exempt from all those burdens which attach to all other persons, it is obvious that both States and cities will be deprived of most valuable subjects and sources of taxation. It is impossible to foresee the mischiefs that will arise from such a limitation upon the powers of the States. We see nothing in the constitution of the United States, or in the decisions of the Supreme Court, warranting such a conclusion."

In a long line of cases there has been an attempt to evade taxation of the property and franchises of the Western Union Telegraph Company on the ground that it was engaged in interstate commerce, and that to tax it would be taxing federal instrumentalities, because some of its rights were procured from Congress. In every one of these cases the tax was sustained and the case of *The Western Union Telegraph Company* vs. *Texas, 105 U. S. 460, 26 L. Ed. 1067*, cited by Plaintiff in Error, was distinguished.

Ratterman vs. *Western Union Telegraph Company, 127 U. S. 411.*

Massachusetts vs. *Western Union Telegraph Company, 141 U. S. 40.*

Western Union Telegraph Company vs. *Massachusetts, 125 U. S. 530.*

Western Union Telegraph Company vs. *Gottlieb, 190 U. S. 412.*

Western Union Telegraph Company vs. *Trapp, 186 Fed. Rep. 114.*

In the case of *Western Union Telegraph Company*

vs. *Gottlieb, supra,* referring to the earlier cases of the same company Mr. Justice McKenna says page 424:

> "These cases established that in estimating the value of the property of a telegraph company situate within a State it may be regarded not abstractly or strictly locally, but as a part of a system operated in other States, and that the State was not precluded from taxing the property because the State had not created the company or conferred franchise upon it, or because it derived rights or privileges under the act of July, 1866, or was engaged in interstate commerce. Every one of the fundamental propositions, therefore, contended for by the plaintiff in error, those decisions declare unsound."

And in the case of *Western Union Telegraph Company* vs. *Massachusetts, supra,* Mr. Justice Miller quoted approvingly from the case of Railroad *vs.* Peniston, 18 Wall. 5, as follows: (Italics ours.)

> *"A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. * * * * Were they exempt from liability to contribute to the revenue of the States it is manifest the State government would be paralyzed."*

Other Illustrations.

There are a number of other illustrations where the courts have refused to permit exemption from tax on the ground of governmental agency or instrumentality.

In *Society for Savings* vs. *Coite, 6 Wall. 594,* the Supreme Court of the United States held as stated in the syllabus:

> "A statute of a State requiring savings societies, authorized to receive deposits but without authority to issue bills, and having no capital stock, to pay annually into the State treasury a sum equal to three-fourths of one per cent. on the total amount of their deposits on a given day, imposes a franchise tax, not a tax on property.
>
> Such a tax is valid.
>
> Consequently the fact that a savings society so taxed has invested a part of its deposits in securities of the United States declared by Congress, in the act which authorized their issue, to be exempt from taxation by State authority, does not exempt the society from taxation to the extent of deposits so invested."

In the case of *Swartz* vs. *Hammer, 194 U. S., 441,* it is held that notwithstanding the bankruptcy act of 1898, which is exclusively an instrumentality and agency of the federal government, requires the property of a bankrupt to be put into the hands of a trustee in bankruptcy, who is under the exclusive jurisdiction of the Courts of the United States, "there is nothing in the Bankruptcy Act of 1898 which exempts property in the hands of a trustee in bankruptcy from the State and municipal taxes to which similar property in the same locality is subject."

In *Thompson* vs. *Kentucky, 209 U. S. 340,* it is held that:

> "It is within the power of the State to tax spirits in bonded warehouses and require the warehouse-

> man to pay the same with interest after the taxes due to the United States government have been paid."

These warehouses are bonded to the federal government, and are under the control of the federal government.

In *Henderson Bridge Company* vs. *Henderson City, 173 U. S. 592, 43 L. Ed. 835,* the question arose of the right of the city of Henderson, a municipal corporation of Kentucky, to tax the property of the Bridge Company, a corporation of Kentucky, under the care, management and control of the Louisville & Nashville Railroad Company, a corporatoin of that Commonwealth. The bridge was erected across the Ohio river to a point on the Indiana side of the river. The city boundary of the city of Henderson extended "to low water mark on the Ohio river on the Indiana shore." *The bridge was located and constructed in conformity with two Acts of Congress of the United States, one entitled: "An act to authorize the construction of bridges across the Ohio river, and to prescribe the dimensions of the same" approved December 17, 1872, ch. 4, Stat. 398. And the other was an act supplemental to this act, approved February 4, 1883. The Ohio river was an navigable stream within the entire control and jurisdiction of Congress.* Upon these facts it was argued that the franchise was a franchise from the national government.

Mr. Justice Harlin, in sustaining the tax said, page 622:

> "Nor do we perceive that the power of Kentucky to tax this bridge structure as property is any the less by reason of the fact that it was erected in and over the Ohio River under the au-

thority or with the consent of Congress. The taxation of the bridge by Kentucky is in no proper sense inconsistent with the power of Congress to regulate the use of the river as one of the navigable waters of the United States. This taxation does not interfere in any degree with the free use of the river by the people of all the States nor with any jurisdiction that the State of Indiana may properly exercise over that stream."

And, quoting from Thompson *vs.* Union Pacific Railroad Co., 9 Wall. 579, said:

> "There is a clear distinction between the means employed by the government, and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always or generally taxation of the means."

In a prior case between the same parties, *141 U. S. 679, 35 L. Ed. 900,* it was held:

> "That the taxation of the bridge was not a regulation of commerce or the taxation of any agency of the Federal government."

In the case of *Flint* vs. *Stone Tracy Company, 220 U. S. 109,* which involved the Corporation Tax law of 1909, the converse of this proposition was advanced. It was there claimed that the act of Congress was void "because it levies a tax upon the exclusive right of a State to grant corporate franchises, because it taxes franchises which are the creation of the State in its sovereign right and authority," and the Court again emphasizes that the exemption from taxation is limited to corporations "carrying out governmental functions for the United States."

The cases of *Ambrosini* vs. *United States, 187 U. S. 1,* and *Bettman* vs. *Warwick, 108 Fed. Rep. 46,* are relied upon by the Plaintiff in Error.

In the first case, Ambrosini gave two bonds required by the so-called "Dramshop" act of Illinois, but failed to affix the War Revenue stamp as required by the Act of 1898, and the question was upon the right to impose a tax upon these bonds. The right to the tax was not sustained, but Mr. Chief Justice Fuller confined the exemption to governmental instrumentalities.

He said, page 7:

> "The granting of the licenses was the exercise of a strictly governmental function, and the giving of the bonds was part of the same transaction. To tax the license would be to impair the efficiency of State and municipal action on the subject and assume the power to suppress such action. And considering license and bond together, taxation of the bond involves the same consequences. In themselves the bonds were not mere incidents of the regulation of the traffic, but essential safeguards against its evils, and governmental instrumentalities of State and of city, as authorized by the State, to insure the public welfare in the conduct of the business, although the business itself was not governmental. They were not mere individual undertakings to secure a personal privilege as suggested by the court below, but means for the preservation of the peace, the health and the safety of the community in compelling strict observance of the law, and remedying injurious results.
>
> The general principle is that as the means and instrumentalities employed by the General Government to carry into operation the powers granted

to it are exempt from taxation by the States, so are those of the States exempt from taxation by the General Government. It rests on the law of self-preservation, for any government, whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government, exists only at the mercy of the latter."

In the case of *Bettman* vs. *Warwick*, *supra*, the question was whether the stamp tax under the War Revenue Act of 1898 could be imposed upon a bond of a Notary Public appointed under the laws of the State, by the government, on the ground that the tax was upon the bond of a State officer. It was held exempt.

ATTORNEY GENERAL'S CONSTRUCTION OF THE ACT OF CONGRESS.

The construction which the Attorney General of the United States has placed upon this act shows that there is nothing in the act of Congress which justifies the contention that the act grants any franchises, or that becoming surety on a bond was intended in any way to be exercising a governmental franchise or agency, and indicates that the Federal government did not attempt thereby to take away from the State the right to put upon such surety companies any proper restrictions and impose such taxes as it may see fit. He said:

"If the laws of a State under which a surety company is incorporated limit the amount of liability to a certain per centum of capital which can

be incurred on account of any one partnership or association, and if a greater amount of liability is incurred, it is to be secured by a collateral agreement of indemnity, such provision is thereby made a part of its charter, and to that extent it is restricted in its dealings with the United States."

23 Opinions of Attorney General, page 421.

IV.

THERE IS NO ALLEGATION OR EVIDENCE THAT, EVEN IF ACTING AS A FEDERAL AGENT, THE IMPOSITION OF THE TAX WOULD IN ANY WAY IMPAIR THE EFFICIENCY OF THE PLAINTIFF IN ERROR TO PERFORM ITS DUTY TO THE GOVERNMENT.

There is absolutely no suggestion in this record, as indeed there could not well be, because of the financial responsibility of the Plaintiff in Error, that any tax imposed by the State of Pennsylvania would interfere with the Plaintiff in Error in discharging any contingent liability upon the bonds issued by it.

Immunity from taxation by a State is granted to a Federal agent only upon the theory that such taxation may interfere with the usefulness or efficiencey of the agent in serving the Federal Government.

In the case of *First National Bank* vs. *Kentucky*, 9 Wall. 353; 19 L. Ed. 701, Mr. Justice Miller, referring to the rule laid down in *McCulloch* vs. *State of Maryland, 4 Wheat. 316*, said:

"But the doctrine has its foundation in the proposition, that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the States."

In *Railroad Company* vs. *Penniston, 18 Wall. 5; 21 L. Ed. 787,* Mr. Justice Strong said page 36: (Italics ours.)

> *"It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power."*

In the case of *Reagan* vs. *Mercantile Trust Company, 154 U. S. 413; 38 L. Ed. 1028,* Mr. Justice Brewer said (Page 416.) (Italics ours.)

> *"Conceding to Congress the power to remove the corporation in all its operations from the control of the State, there is in the act creating this company nothing which indicates an intent on the part of Congress to so remove it, and there is nothing in the enforcement by the State of reasonable rates for transportation wholly within the State which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress."*

In the case of *Western Union Telegraph Company* vs.

Attorney General of Massachusetts, 125 U. S. 530; 31 L. Ed. 790, where there was also an effort to escape taxation on the capital stock of the company because the corporation had accepted the Act of Congress of July 24, 1866, and was an agent of the Federal Government, Mr. Justice Miller, quoting from *Railroad Company* vs. *Penniston, 18 Wall. 5, said:* (Italics ours.)

> "It is often a difficult question whether a tax imposed by a State does in fact invade the domain of the General Government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. *It cannot be that a State tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the Constitution.* To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid."

In the syllabus it is said:

> "Agencies of the Federal Government are only exempt from State taxation so far as such taxation may interfere with or impair their efficiency in performing the functions by which they serve the government."

Therefore, even conceding the agency for the purpose of argument, there being nothing shown or even suggested, that this tax will in any way destroy the efficiency of the Plaintiff in Error, the tax is not invalid on that account.

V.

THE PREMIUMS TAXED HAVE NOT BEEN PAID BY THE FEDERAL GOVERNMENT, WHICH IS CONCERNED ONLY WITH SECURING A SUFFICIENT BOND, WHETHER THE SURETY BE INDIVIDUALS OR CORPORATIONS.

This is not a case of seeking to impose a tax upon the receipts of the Plaintiff in Error which have come from the Federal government for Federal business. These premiums are not paid by the Federal government, but by the principals in the bonds. The Federal government has not requested the Plaintiff in Error to become surety for it. It has merely accepted the Plaintiff in Error as surety when tendered by the principal in the bond. With many of these bonds the Federal government is not in any sense concerned, except merely that it runs to the government for the use of the parties interested, such as those bonds given in litigation in the Federal courts.

The case of *Western Union Telegraph Company* vs. *Texas, 105 U. S. 460, 26 L. Ed. 1067*, illustrates this distinction. In that case the State of Texas imposed a tax upon corporations doing business in the State of one cent for every full rate message sent and one-half cent for every message less than full rate, and the tax was resisted on the ground that it included messages used in interstate commerce "and for the government and public business."

Mr. Chief Justice Waite said page 461: (Italics ours)

> "*As to government business, companies of this class become governmental agencies.* * * * The precise question now presented is, whether the

power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State *or sent by public officers on the business of the United States.*"

To that extent only was the tax held invalid.

The Contention of the Plaintiff in Error Followed to Its Logical Conclusion Shows its Absurdity.

The receipts by every railroad for carrying the United States mails or materials for warships, for instance, help to pay the dividends on the capital stock and swell the assets; thereby enhancing the value of the capital stock for taxation. To pay the tax lessens the ability of the company to properly carry the mails and materials for warships.

If the tax on the surety on a bond of a Federal employee, is embarrassing the operations of the government, certainly no railroad that carries the mails should be taxed on its capital stock.

The same argument applies to every contractor who furnishes munitions of war. If he takes his money to pay taxes on his property, he has that much less money to carry out the contract with the government and, therefore, upon that theory such a contractor should be relieved from taxation.

The contractor pays his taxes and has that much less money with which to carry out his contract with the government.

These illustrations, which might be multiplied, show the absurdity of the appellant's claim, and yet both of them come nearer exercising governmental functions and instrumentalities than the appellant.

But the acme of absurdity of the appellant's position is reached when it claims exemption on bonds given in litigation in Federal Courts, merely because they run to the United States, and in which the United States has no interest whatever.

There is no suggestion on the part of the appellant that the premium will be less if the tax is not imposed. The government is only concerned in the event of the failure of the contractor, or the employees to discharge the duties encumbent upon them. In some of the bonds it is not concerned at all, even contingently.

Conclusion.

For the reasons submitted in this Brief, as well as those stated in the opinion of the Court of Common Pleas of Dauphin County, Pennsylvania, it is submitted:

That in becoming surety upon the bonds for which the premium taxed was received the Plaintiff in Error was not operating under any Federal franchise.

That there is no governmental function which requires the giving of a bond and, therefore, the Plaintiff in Error was exercising no such function.

That the Plaintiff in Error was not requested by the government to become surety upon the bonds, and it was in no sense an agency or instrumentality of the Federal government in becoming surety to the Federal government. It was at most assuming a liability to, but not discharging a duty of, the Federal government.

Even assuming the Plaintiff was an agency of the

Federal government in becoming its surety, the tax in no way impairs the efficiency of the Plaintiff in Error to perform its obligation.

That the Federal government does not pay the premium taxed.

Therefore, the judgment of the Supreme Court of Pennsylvania should be affirmed.

WM. M. HARGEST,
Deputy Attorney General.

FRANCIS SHUNK BROWN,
Attorney General.

For Commonwealth of Pennsylvania.
Defendant in Error.

FIDELITY & DEPOSIT COMPANY OF MARYLAND *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 114. Argued January 6, 1916.—Decided February 21, 1916.

A State may not directly and materially hinder the exercise of the constitutional powers of the United States by demanding, in opposition to the will of Congress, that a Federal instrumentality pay a tax for performing its functions.

Mere contracts, however, between it and the United States do not render a private corporation an essential governmental agency and confer freedom from state control.

The Act of August 13, 1894, c. 282, 28 Stat. 279, allowing certain corporations to be accepted as surety does not endow them with power, or create them instrumentalities of the United States, and relieve them from compliance with the laws of, or payment of the lawful taxes in, the States in which they transact their business.

The statute of Pennsylvania of June 28, 1895, imposing taxes on premiums collected by certain classes of insurance companies, is not, as applied to premiums on bonds of United States government officials given by surety companies complying with the act of 1894, unconstitutional as an interference with the powers of the Federal Government by taxing an instrumentality thereof.

244 Pa. St. 67, affirmed.

THE facts, which involve the right of a State to tax a foreign corporation doing business within the State on premiums received for bonds of surety required of its officers and others by the United States, are stated in the opinion.

Mr. Charles Markell, Jr., with whom *Mr. Charles F. Patterson* was on the brief, for plaintiff in error.

Mr. William M. Hargest, with whom *Mr. Francis Shunk Brown*, Attorney General of the State of Pennsylvania, was on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

We are asked to reverse a judgment of the Supreme Court of Pennsylvania which denied plaintiff in error's claim that in becoming surety upon bonds required by the United States it acted as a Federal instrumentality and was not subject to taxation on the premiums received. 244 Pa. St. 67.

Incorporated under the laws of Maryland, the Fidelity & Deposit Company is empowered by its charter to act as surety. It was duly licensed to transact business in Pennsylvania. In pursuance of the Act of Congress referred to below, the Attorney General granted it authority to enter into obligations required by laws of the United States.

Contracting within Pennsylvania, the company became surety, during 1909, on bonds in the following matters: "Internal Revenue, customs, United States government officials, United States government contracts and banks for United States deposits, bonds given in Courts of the United States in litigation there pending." Gross premiums thereon amounting to $17,646.86 were collected. Within the same period it also became party to other bonds and received therefor $198,199.19. The State demanded two per centum of such total receipts, basing its claim on the proviso in § 1, Act of Assembly, June 28, 1895, P. L. 408, which declares: "That hereafter the annual tax upon premiums of insurance companies of other States or foreign governments shall be at the rate of two per centum upon the gross premiums of every character and description received from business done within this Commonwealth within the entire calendar year preceding." The amount demanded because of premiums on bonds not authorized or required by the United States, was paid; but liability for $352.92 assessed in respect of those so authorized,

was denied, and to enforce it the present suit was instituted in the Common Pleas Court, Dauphin County.

The Act of Congress entitled "An Act Relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon," approved August 13, 1894 (c. 282, 28 Stat. 279), provided:

SEC. 1. "That whenever any recognizance, stipulation, bond or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing anything in such recognizance, stipulation, bond, or undertaking specified, is by the laws of the United States required or permitted to be given with one surety or with two or more sureties, the execution of the same or the guaranteeing of the performance of the condition thereof shall be sufficient when executed or guaranteed solely by a corporation incorporated under the laws of the United States, or of any State having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings: *Provided*, That such recognizance, stipulation, bond, or undertaking be approved by the head of department, court, judge, officer, board, or body executive, legislative, or judicial required to approve or accept the same. But no officer or person having the approval of any bond shall exact that it shall be furnished by a guarantee company or by any particular guarantee company."

SEC. 2, that "no such company shall do business under the provisions of this Act beyond the limits of the State or Territory under whose laws it was incorporated and in which its principal office is located . . . until it shall by a written power of attorney appoint some person residing within the jurisdiction of the court for the judicial district wherein such suretyship is to be undertaken, . . . as its agent, upon whom may be served

all lawful process against such company, . . ." Section 3, that every company before transacting business under the Act shall deposit with the Attorney General of the United States a copy of its charter and a statement showing assets and liabilities, and "if the said Attorney General shall be satisfied that such company has authority under its charter to do the business provided for in this Act, and that it has a paid up capital of not less than $250,000 in cash or its equivalent, and is able to keep and perform its contracts, he shall grant authority in writing to such company to do business under this Act." Section 4, that quarterly statements shall be filed with the Attorney General, who shall have power to revoke the authority of any company "whenever in his judgment such company is not solvent or is conducting its business in violation of this Act." Section 5, that "any surety company doing business under the provisions of this Act may be sued in respect thereof in any court of the United States" which has jurisdiction, in the district in which the instrument was made or guaranteed or the principal office of the company is located. Section 6, that "all right to do business under this Act" shall be forfeited upon failure to pay a final judgment against it. Section 7, that a company having executed any instrument under the act shall be estopped to deny its corporate power to execute same. Section 8, that penalties therein prescribed for failure to comply with the provisions of the Act shall be recovered by suit.

The Court of Common Pleas held the tax "is a charge for the privilege of transacting business in the State, measured by the amount of the business done;" there is "nothing in the Act of Congress to support the proposition that the defendant was authorized by it to transact its business in the State of Pennsylvania;" and in executing the specified bonds the surety company "was in no sense an instrumentality of Government." Judgment was ac-

cordingly rendered for the State; and, on appeal, this was affirmed upon findings and opinion below.

In behalf of plaintiff in error, counsel maintain that the taxing power of the State has been so exercised as to collide with operations of the Federal Government; that under the Act of Congress the surety company became a Federal instrumentality with power to execute bonds within the State and consequently could not be subjected to a privilege tax therefor.

That the challenged tax "is an exaction for the privilege of doing business," seems plain (*Equitable Life Ass. Soc.* v. *Pennsylvania*, 238 U. S. 143); and undoubtedly a State may not directly and materially hinder exercise of constitutional powers of the United States by demanding in opposition to the will of Congress that a Federal instrumentality pay a tax for the privilege of performing its functions. *Farmers' Bank* v. *Minnesota*, 232 U. S. 516; *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292. But mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies and confer freedom from state control. *Baltimore Ship Building Co.* v. *Baltimore*, 195 U. S. 375. Moreover, whatever may be their status, if the pertinent statute discloses the intention of Congress that such corporations contracting under it with the Federal Government shall not be exempt from state regulation and taxation, they must submit thereto. *National Bank* v. *Commonwealth*, 9 Wall. 353, 362; *Van Allen* v. *Assessors*, 3 Wall. 573, 585; Cooley on Taxation, 3d ed., pp. 130, 131.

As revealed by its title, the purpose of the Act of 1894 is "to allow certain corporations to be accepted as surety, etc." It does not undertake to endow any corporation with power, but only to permit those complying with specified conditions to exercise their lawful powers, derived from other sources, by contracting with the Govern-

ment under official approval. "Power to guarantee," required by § 1, is not the same thing as "authority under its charter," referred to in § 3; and we think the clear intent was that existence of the former should be determined by the laws in force at place of contract. Neither circumstances nor language of the act indicate design or necessity to limit application by the several States of a well-established system of licensing and taxing bonding companies not incorporated under their own statutes. Plaintiff in error's right to carry on business in Pennsylvania depended upon compliance with its laws.

We find no error in the judgment of the court below and it is

Affirmed.